(23,295)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 720.

MATTIE W. JACKSON, WIDOW; WILLIAM GRAHAM JACKSON AND GLADYS L. JACKSON, INFANTS, BY MATTIE W. JACKSON, THEIR NEXT FRIEND, AND ERNEST H. JACKSON, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

1 *I. Original Petition. Filed February* 21, 1894.

In the United States Court of Claims.

WILLIAM L. JACKSON, Executor of the Estate of Mary E. Jackson, et al.,
vs.
THE UNITED STATES.

Petition.

To the Honorable the Chief Justice and the Associate Justices of the United States Court of Claims:

William L. Jackson, Executor of the estate of Mary E. Jackson, deceased, and William L. Jackson, individually, and Ernest H. Jackson, sole devisees and heirs at law of the deceased, all residents of Adams county, Mississippi, and citizens of said State, bring this their petition against the United States, and show to the Court:

1. That said William L. Jackson, individually, and said Ernest H. Jackson, as sole devisees and heirs at law aforesaid, own as tenants in common, and said William L. Jackson, as executor aforesaid, possesses, that certain tract of land and cotton plantation, situated in Adams county, Mississippi, on the East bank of the Mississippi river, at Jackson's Point, about forty miles below the City of Natchez, and twenty-five miles above the mouth of the Red river, known as Jackson's Point, Alloway, Cerro Gordo and Black Hills plantations, containing 1325 acres of cultivated land and 1095 acres of wild land, more or less, and bounded, North by the Mississippi river; West by the Mississippi river; South by Wakefield plantation, belonging to Brown & Larned and Mrs. M. C. Dunbar, and East by lands of Mrs. Lucy Gastrell and H. C. Cameron.

2. That before and prior to the year 1890 said plantation from its natural situation, was comparatively high and exempt from overflow from the waters of the Mississippi river, except at long intervals, and the occurrence of such overflows did not materially affect its productive capacity, or its value.

That said plantation was highly improved, well stocked with laborers and tenants, yielded yearly large crops of cotton, corn and other products, and was worth the sum of fifty thousand dollars.

3. That about the year 1883 the officers and agents of the United States, in pursuance of the act of Congress creating the Mississippi River Commission, and of the subsequent acts for the improvement of the navigation of the Mississippi River, adopting the so-called Eads' plan, projected, and have constructed, and are constructing, a system of public works for the purpose of so confining the waters of the river between lines of embankment, or levees, as to give increased elevation and velocity and force to the current in order to

scour and deepen the channel, and have thus caused an increased and abnormal elevation of at least four feet to the waters of the river at the high water or flood stage; and for said purposes have adopted and made use of systems of public and private levees, originally constructed for the reclamation of overflowed lands, on the west bank from the highlands of Arkansas to the mouth of the Red river, and from the mouth of the Red river to the Passes, and on the east bank from the highlands of Tennessee to the mouth of the Yazoo river, and from Baton Rouge to the Passes; but from the mouth of the Yazoo river to Baton Rouge, instead of adopting and constructing levees, have made use of the highlands skirting the river for said purpose, and have thus placed the plantations of petitioners, and others similarly situated between the lines of embankment, and exposed to the full force of the currents of the river, with such increased and abnormal flood level.

And are so raising, enlarging, strengthening, adding to and constructing such levees, as to cause the plantations of petitioners, and others so situated to be flooded annually by the waters of the river, and to destroy the crops, growing and grown thereon, and to drown the live stock, and to undermine and wash away the buildings, fences and other improvements, and to fill up the drains and ditches, and to wash off the soil, and to cover the lands with sand and gravel, and to render them unfit for cultivation, and to entirely destroy their value.

2 4. That in pursuance of the said plan for the improvement of the navigation of the river, the said officers and agents of the United States have undertaken to close the Atchafalaya river, a natural outlet carrying off near one-third of the surplus waters of the Mississippi, and to force the waters of the Red river and its tributaries, from their natural course through the Atchafalaya river to the Gulf of Mexico, into the channel of the Mississippi river, and have so obstructed, and are so obstructing, the passage of the surplus waters through the Atchafalaya as to cause the waters of the rivers at the flood stage to annually back up and overflow the lands of petitioners, and to destroy the crops, growing and grown thereon, and to deposit thereon superinduced additions of water, earth, sand and gravel, so as to render them unfit for cultivation, and to entirely destroy their value.

5. That by reason of the premises aforesaid the lands of petitioners, which before, from their natural situation, were comparatively high and secure from overflow, have been flooded annually by the waters of the rivers thus confined, in the years 1890, 1891, 1892 and1893, and the crops growing and grown thereon, have been each year destroyed by said overflows, so caused, and the live stock drowned, and the buildings and fences and other improvements undermined and washed away, and the ditches and drains filled up and the soil washed off, and covered with sand, and earth and gravel, so as to render them unfit for cultivation, and to entirely destroy their value, to the injury and damage of petitioners, as follows, to-wit:

1890—	
To 197 bales of cotton at $40 per bale	$7,880 00
To houses and fences injured and lost	500 00
To 4 mules lost, at $125 each	500 00
To 3000 bushels of corn destroyed	1,500 00
To 25 head of cattle lost	250 00
To 15 head of sheep lost	22 50
1891—	
To 100 bales of cotton at $40 per bale	4,000 00
To houses and fences injured and lost	250 00
To 3 mules lost at $100 each	300 00
To 10 head of sheep lost	15 00
1892—	
To 531 bales of cotton destroyed, at $50 per bale	25,550 00
To 3000 bushels of corn destroyed	1,500 00
To houses and fences injured and lost	50 00
To 6 mules lost, at $100 each	600 00
To 60 head of sheep lost	90 00
1893—	
To 415 bales of cotton destroyed, at $30 per bale	12,450 00
To 1,500 bushels of corn destroyed	750 00
To houses and fences injured and lost	50 00
To value of lands and improvements destroyed	50,000 00
Total	$107,257 50

And your petitioners say that this precipitation, and this backing, of the waters of the river, by the works of the United States for the improvement of the navigation of the river, so as to overflow the lands of petitioners annually, and to destroy the crops, growing and grown thereon, and to drown the live stock, and wash away the buildings, fences and other improvements, and to fill up the drains and ditches, and to wash off the soil, and to cover the lands with sand, earth and gravel, and to render them unfit for cultivation, and to entirely destroy their value, is such a serious interruption to the common and necessary use of the property as to be equivalent to a taking within the meaning of the Constitutional provisions, and being done in pursuance of the acts of Congress authorizing it for the public benefit, and under the direction of the Mississippi River Commission and the Secretary of War, and the United States Engineers, imposes on the United States an implied obligation to make compensation for the property so taken and destroyed. Wherefore they bring this suit, and pray that it be adjudged and decreed that the United States pay to petitioners the value of their property so taken for public use, to the amount of $107,257.50; and for such other relief in the premises as the nature of the case may require.

WM. L. JACKSON, *Executor.*
WM. L. JACKSON.
E. H. JACKSON.

3 Before me personally came and appeared William L. Jackson, individually and as Executor of Mary E. Jackson, and Ernest H. Jackson, who being by me duly sworn, depose and say that they believe the facts as stated in their said petition to be true, that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, that said claimants are justly entitled to the amount therein claimed from the United States, after allowing all just credits and offsets, and that the claimants have at all times borne true allegiance to the Government of the United States.

WM. L. JACKSON, *Executor.*
WM. L. JACKSON.
E. H. JACKSON.

Subscribed and sworn to before me, January 1, 1894.
VOLNEY M. LIDDELL, *J. P.*

II. Demurrer. Filed May 31, 1894.

Comes the Attorney-General and demurs to the petition heretofore filed in this cause upon the following grounds:

1. Because the petition does not show that the defendant has done any act within six years next before the filing thereof by which claimants have been injured.
2. Because the petition shows that the injury complained of did not grow out of any contract express or implied between claimants and defendant, but was a tort of which this court has no jurisdiction.
3. Because the petition does not state a case of which this court has jurisdiction.

J. E. DODGE,
Assistant Attorney-General.

III. Argument and Submission of Demurrer.

On the 23rd day of April 1896, the demurrer came on to be heard. Mr. Samuel A. Putman was heard in support of the demurrer, no attorney being present for the claimants, and the demurrer was submitted.

4 *IV. Opinion of the Court Overruling Demurrer. Filed June 1, 1896.*

WILLIAM L. JACKSON et al.
v.
THE UNITED STATES.

NOTT, J., delivered the opinion of the court:

The question in this case is whether it comes within the decision in Hayward (30 C. Cls. R., 219) or within the decision in Pumpelly v. Green Bay Company (13 Wall. R., 166).

In the former case the act assigned as the taking of the claimant's land was not so much what the Government did as what it neglected to do. The land was overflowed, washed away, and for practical purposes destroyed. The cause alleged was the faulty construction of a dam. The effect of this faulty construction was a catastrophe—the breaking of the dam during a freshet. The washing away of all that made the land valuable in a single hour caused the destruction; and there was no actual or constructive user of the claimant's property by the Government for any purpose whatever.

In the case of Pumpelly v. Green Bay Company, a permanent dam had been erected. The report of the case does not set forth the declaration by which the facts were presented to the Supreme Court; and it is not altogether clear what those facts were. This much, however, is stated by the reporter, "The declaration averred the waters of the lake were raised so high as to forcibly and with violence overflow all his said land, from the time of the completion of the dam, in 1861, to the commencement of this suit; the water coming with such a violence as to tear up his trees and grass by the roots and wash them, with his hay by tons, away, to choke up his drains and fill up his ditches, to saturate some of his lands with water, and to dirty and injure other parts by bringing and leaving on them deposits of sand, and otherwise greatly injuring him." It also appears, in the opinion of the court, that "the declaration states that by reason of the dam the water of the lake was so raised as to cause it to overflow all his land, and that the overflow remained continuously from the completion of the dam in the year 1861 to the commencement of the suit in the year 1867." The court adds that "the nature of the injuries set out in the declaration are such as to show that it worked an almost complete destruction of the value of the land."

A continuous overflow of the land and "an almost complete destruction of the value of the land" seem to be the two important facts upon which the Supreme Court rested its decision that there had been a taking of private property for public purposes within the intent and meaning of the Constitution.

In the present case the facts are also presented by the pleadings. The petition, which is confessed by demurrer, alleges that in the year 1883 the officers of the United States in pursuance of the act of Congress creating the Mississippi River Commission projected a system of public works for the purpose of so confining the waters of the river between lines of embankments or levees as to give increased elevation and velocity and force to the current, and have thus caused an increased and abnormal elevation in the waters of the river at high water or flood stage. The petition also alleges that the effect of these public works is to "cause the plantations of petitioners, and others so situated, to be flooded annually by the waters of the river, and to destroy the crops growing and grown thereon, and to drown the live stock, and to undermine and wash away the buildings, fences, and other improvements, and to fill up the drains and ditches, and to wash off the soil, and to cover the lands with sand and gravel, and to render them unfit for cultivation, and to entirely destroy their value.

"That in pursuance of the said plan for the improvement of the navigation of the river the said officers and agents of the United States have undertaken to close the Atchafalaya River, a natural outlet carrying off near one-third of the surplus waters of the Mississippi, and to force the waters of the Red River and its tributaries from their natural course, through the Atchafalaya River to the Gulf of Mexico, into the channel of the Mississippi River, and have so obstructed and are so obstructing the passage of the surplus waters through the Atchafalaya as to cause the waters of the rivers at the flood stage to anually back up and overflow the lands of petitioners, and to destroy the crops growing and grown thereon, and to deposit thereon superinduced additions of water, earth, sand, and gravel, so far as to render them unfit for cultivation and to entirely destroy their value."

5 The material difference between this case and that of Pompelly v. Green Bay Company is that here the overflow of the water was not continuous. But the essential fact is averred that the annual overflow of the claimants' land in consequence of the Government's works is such as "to render them unfit for cultivation and to entirely destroy their value." In that essential this case is stronger than the other, for Mr. Justice Miller says that the facts averred are such as to show that the dam and consequent overflow "worked an almost complete destruction of the value of the land."

It is true that here the claimant is free to go upon his land during the non-agricultural portions of the year; that is to say, after the spring and summer floods have passed away. But so was the plaintiff, in the other case, free to go upon his land while it was overflowed and do what he could with it. It is not an absolute taking of land which constitutes a taking of private property for public use. Mr. Justice Miller, quoting Angel on Water Courses and stating apparently the conclusion of the court, says that "there are numerous authorities to sustain the doctrine that a serious interruption to the common and necessary use of property may be equivalent to the taking of it, and that under the constitutional provision it is not necessary that the land should be absolutely taken."

The petition undoubtedly sets up losses which are in the nature of consequential damages, of which the court has not jurisdiction. The Government may have increased the effect of the flood wrongfully or rightfully by the erection of its levees; but it did not in the constitutional sense of the term take the claimants' cotton, mules, corn, cattle, and sheep for public use. Such a claim is not founded on an implied contract, and of it the court has not jurisdiction. But the petition does allege that "the value of the land and the improvements destroyed was $50,000;" and that taking is presented by allegations so closely resembling those in the Pumpelly v. Green Bay Company Case that this court does not feel at liberty to say that they present no valid cause of action.

The judgment of the court is that the defendants' demurrer to the petition be overruled, with leave to the defendants to answer within thirty days.

6 *V. History of Proceedings.*

On May 4, 1908 the claimant filed a supplemental petition.

On August 14, 1908 the claimant filed a second supplemental petition.

On August 25, 1908 the defendant demurred to the claimants' original petition, the supplemental petition filed May 4, 1908, and the second supplemental petition filed August 14, 1908.

On October 13, 1908 the claimants filed a third supplemental petition.

On February 17, 1909 the defendant demurred to the original and three supplemental petitions.

On April 5, 1909 the demurrer came on to be heard. Mr. William W. Scott was heard in support of the demurrer. Mr. Wade R. Young was heard in opposition, and the demurrer was submitted.

On April 7, 1910 the Court filed the following order on said demurrer:

Within the former ruling in this case (31 C. Cls., 318), the demurrer to the original and supplemental petitions, in so far as they or either of them aver a taking of real estate—within six years from the date of filing of said petitions—by overflow proximately caused by the construction of levees or other public works in the improvement of the navigation of the Mississippi River pursuant to acts of Congress and within the ruling of the cases of Pumpelly v. Green Bay Company (13 Wall., 166) and United States *v.* Lynah (188 U. S., 445), is overruled.

But as to the alleged annual destruction of crops and personal property on said land so taken by overflow the demurrer is sustained.

By THE COURT.

On March 17, 1911, a motion was filed suggesting the death of William L. Jackson, and to revive suit in the name of Mattie W. Jackson, widow, William Graham Jackson and Gladys L. Jackson, infants, and Ernest H. Jackson, which motion was allowed by the Court March 31, 1911.

On March 21, 1911 the defendants filed a general traverse.

7 On April 4, 5, and 6, 1911 the case came on to be heard. Mr. Wade R. Young was heard for the claimants; Mr. William W. Scott was heard in opposition; Mr. Waitman H. Conaway replied and the case was submitted.

On December 4, 1911, the Court filed findings of fact and conclusion of law, dismissing petition; opinion by Booth, J.

On December 13, 1911 the claimants filed a motion to amend the findings of fact.

On January 15, 23, and 24, 1912 this motion came on to be heard. Mr. Waitman H. Conaway was heard in support of the motion, Mr. William W. Scott was heard in opposition thereto; Mr. Conaway replied and the motion was submitted.

VI. On January 25, 1912, the Claimants Filed their Fourth Supplemental and Amended Petition, which is as Follows:

MATTIE W. JACKSON, Widow; WILLIAM GRAHAM JACKSON and GLADYS L. JACKSON, Infants; and ERNEST H. JACKSON,

v.

THE UNITED STATES.

To the Honorable the Court of Claims:

The petition of Mattie W. Jackson, widow, William Graham Jackson and Gladys L. Jackson, infants, who sue by Mattie W. Jackson, their next friend, and Ernest H. Jackson, respectfully show unto the court that there has already been filed in the above styled case the following petitions, viz:

The original petition on February 24, 1894; first supplemental petition filed on May 4, 1908; second supplemental petition filed on August 14, 1908; and their supplemental petition filed on October 13, 1908, which petitions, as petitioners are advised and be-
8 lieve, do not fully state their cause of action against the United States, as shown by the proof in the record, and they desire to supplement the same in the following particulars:

(1) Mary E. Jackson owned and possessed during her lifetime and at the time of her death the plantations described as Jackson Point, Alloway, Cerro Gordo and Black Hills.

(2) By the last will and testament of Mary E. Jackson, bearing date of September 25, 1887, she devised said lands to her son, E. H. Jackson, and appointed her husband, William L. Jackson, testamentary executor, but her husband, as provided by the statutes of Mississippi, renounced the will and took a child's portion, and he and his son, E. H. Jackson, acquired the lands as tenants in common.

(3) Said William L. Jackson died in 1895, testate, and by his last will and testament, bearing date January 19, 1896, devised one-fourth of his interest in said land to said E. H. Jackson and the other three-fourths interest in said land to his widow (he having married a second time) Mattie W. Jackson, for life, with remainder in fee to William Graham Jackson and Gladys L. Jackson, the two children of the marriage, the widow administering on his estate.

(4) Said land was partitioned among the owners thereof by judicial decree of the chancery court of Adams County, Miss., on December 15, 1896, each of the tenants taking his and her shares in severalty, said E. H. Jackson taking five-eighths and said Mattie W. Jackson taking three-eighths, and since that time said lands have been cultivated in severalty.

The decree of the chancery court of Adams County, Miss.,
9 entered December 15, 1896, confirming the commissioners' report partitioning said lands, describes the same as follows, to wit:

To Mattie W. Jackson as follows:

"1st. That certain plantation of land commonly known as 'Cerro Gordo' situate in said county of Adams and State of Mississippi, in

'Dead Man's Bend' on the Mississippi River, said plantation being bounded on the north by lands of the estate of Wm. McElroy, on the east by lands (formerly) of Holliday & Graham, on the south by lands (formerly) of W. H. Dunbar, and on the west by the Mississippi River, containing 200 acres, more or less.

"2d. That certain tract of land situate in said State of Mississippi, County of Adams, on the Mississippi River, known as the 'Black Hills' plantation; bounded on the north by said Mississippi River; east and south by lands formerly of Mary E. Jackson deceased, and Annie M. Helvey, and west by lands of Jacob Miller, containing 57.25 acres, more or less, and with courses and distances as shown by a certain map of record in Book 3-E, page 609, of the records of deeds of said County of Adams, made by C. W. Babbit, C. E., being the same tract of land sold and conveyed to Ernest H. Jackson and William L. Jackson, deceased, by Henry Frank, trustee, by deed dated the 5th of December, 1892, and recorded in Book 3-E, page 733, of said records of deeds.

"3rd. All that certain plantation of land lying, being and situate in the County of Adams, State of Mississippi, on the Mississippi River, in that portion of said county known as Dead Man's Bend,' said plantation being called and known as 'Alloway,' and containing, with the exceptions hereinafter mentioned, the following tracts, to wit:

10 The south half, the northwest quarter, and the west half of the northeast quarter of section six (6), township three (3), range four (4) west, containing 568.27 acres entered by Thos. Lewis, Polly Williams, W. H. Edwards, and Leo. Tarleton. Also lots one (1), two (2), three (3), and four (4), fractional section eighteen (18), township four (4), range four (4) west, containing 314.41 acres, entered by Samuel Martin and Lewis & Barnard. Also lot six (6) of fractional section one (1), township four (4), range five (5) west, containing 80 acres, entered by James Swing. Also the north half of section one (1), township three (3), range five (5) west, containing 322.50 acres. Also lots three (3), four (4), and five (5), township three (3), range five (5) west, containing 240 acres, in all about 1,524 acres (originally). Excepting, however, that certain piece or parcel of land containing 270 acres, set off to Ernest H. Jackson and more particularly described as follows, to wit:

"Beginning for northeast at a point on the Mississippi River at the north end of a ditch at a point designated A on said map; thence south 3 degrees east along the center of said ditch about 28 chains to its southern end, where is planted an iron post on the bank, and on the same course about 49 chains in all to an iron post planted on the south boundary of 'Alloway' at point marked B on said map; thence west through the middle of section 1, T. 4, R. 5, 48.20 chains to a large gum tree, at the point C on said map, on the west bank of a canal and marked x x, and old-established corner; thence north between sections 1 and 2, T. 3, R. 5, W., 40 chains to an iron post and on 25 chains more, between sections 1 and 2 of T. 4, R. 5

11 W., to the bank of the Mississippi River at the point D on said map; thence southeasterly along the river to the place

of beginning; being the tract shaded yellow on said map; and designated thereon by the words and figures '270 acres of Alloway set off to E. H. Jackson.'

To Ernest H. Jackson as follows:

"1. That certain plantation of land, lying, being and situated in said County of Adams, State of Mississippi, in that part of said county known as 'Dead Man's Bend' on the Mississippi River, called and known as 'Jackson's Point,' containing the following tracts, to wit:

"Lots one (1), two (2), three (3), four (4), five (5), and six (6) of fractional section two (2), township four (4), range five (5) west, containing 548 acres. Also the northwest quarter of fractional section two (2), township three (3), range five (5) west, containing 158.62 acres. Also fractional section three (3), township four (4), range five (5) west, containing 126 acres; in all, 832.62 acres; also the batture in front of said section 3, T. 4, R. 5 west, as shown on said map.

"2. All that certain piece or parcel of land containing 270 acres, heretofore a part of the 'Alloway' plantation, and more particularly described as follows, to wit:

"Beginning for northwest corner at a point on the Mississippi River at the north end of a ditch at the point designated A on said map; thence south 3 degrees east along the center of said ditch about 28 chains to its southern end, where is planted an iron post on the bank, and on same course about 49 chains in all to an iron post planted on the south boundary of 'Alloway' at a point marked
12 B on said map; thence west through the middle section 1, T. 4, R. 5, 48.20 chains to a large gum tree at the point C on said map, on the west bank of a canal marked XX, an old-established corner; thence north between sections 1 and 2 of T. 3, R., 5 W., 40 chains to an iron post, and on 25 chains more between sections 1 and 2 of T. 4, R. 5, W., to the bank of the Mississippi River at the point D on said map; thence southeasterly along the river to the place of beginning; being the tract shaded yellow on said map and designated thereon by the words and figures '270 acres of Alloway set off to E. H. Jackson.'

On the 30th day of December, 1899, Ernest H. Jackson purchased from George M. Brown and Rufus F. Learned, for the sum of $13,000, the Wakefield plantation, described in said deed of conveyance as follows:

"All that certain tract of land situated, lying and being in the County of Adams, State of Mississippi, and now known as Wakefield plantation, being lot No. 3 of the original Wakefield plantation, which was allotted and set apart to Brown & Learned of the first part by the final decree of the chancery court of Adams County, rendered October 24, 1891, in that certain partition suit styled Mary C. Dunbar, et al., v. Ida Dunbar, et al., numbered 1004 on the general docket of said court, said final decree being of record on pages 768-770 of Book 3-H of the records of deeds of said Adams County. Said lot No. 3 at time of rendition of said decree contained 240 acres of open land and 1,170 acres of batture, in all 1,460, as will appear from the map of Wakefield plantation filed in said cause

and of record on page 451 of Book M of final records of chancery court, and it is described in said final — as follows, to wit:

13 "Lot No. 3, beginning at S.E. corner at corner of sections 4 and 5 post, where a china tree bears N. 7 degree- E. 50 feet; thence with line of the Baker tract N. 1 degree 25 minutes W., 82 chains to S.W. corner of lot No. 2 of Wakefield, and on same course with lots No. 2 about 30 chains to Canal Bayou; thence along Canal Bayou, and the middle of the slough previously mentioned, with lot No. 1 to N.W. corner of lot No. 1; thence west with W. L. Jackson 7.00 chains to an iron post to mark the 1¼ section corner of sections 2 and 3; thence N. 1 degree 25 minutes W., still with W. L. Jackson, 40 chains to iron pin on township line to mark corner of 2 and 3; thence west on township line at 13.70 chains is stake in road, where a china tree bears N. 64 degrees E. 48 links at 43.70, across a wire fence 80.00 is on bank of Mississippi River, where cottonwood XS. 25 degrees E. 18.00 north 23.00 N. 38½ E. 35; thence down the river to south boundary of section 4 and with it east to the beginning; also all the batture and alluvial deposits lands now connected to or belonging to said lot No. 3 of original Wakefield plantation."

(5) That said Jackson lands are situated at Jackson Point, in the Alluvial Valley of the Mississippi, on the left bank of the river, 40 miles below Natchez and 25 miles above the mouth of Red River.

(6) That the basin in which the Jackson lands are situated commences at Ellis Cliff, about 20 miles below Natchez, and extends to Fort Adams, about 50 miles below, with an average width of 2 miles and a maximum width of 6 miles, and is one of six (6) small basins of the Homochitto Basin.

(7) That before and prior to the year 1890 said plantations, from their natural situation, were comparatively high and exempt from overflow by the flood waters of the Mississippi River,

14 except at long intervals, and the occurrence of such overflows did not materially affect their productive capacity or their value.

(8) That said plantations were highly improved, well stocked with tenants and laborers, yielded yearly large crops of cotton, cotton seed, corn, hay and other products, and were well worth the sum of $300,000.00, and except for the injuries complained of would be now worth said sum of $300,000.00.

(9) That for time beyond the memory of man the flood waters of the Mississippi River, passing Helena, Ark., where the highlands abut on the river, had escaped into the White River and Upper Tensas Basins, and passed in part through the Boeuf Cut-off into the Ouachita Basin, and in part down the Bayous Macon and Tensas, and on by the Atchafalaya River to the Gulf of Mexico, and if they ever reached the lands of claimants in sufficient volume to flow them were speedily reduced by crevasses on the west bank, which allowed them to escape into the Atchafalaya Basin, and thus relieved the lands of claimants.

(10) That about the year 1883 the officers and agents of the United States, in pursuance of the Act of Congress creating the

Mississippi River Commission, and of the subsequent acts for the improvement of the navigation of the Mississippi River, adopted the so-called Eads plan, by Act of Congress approved March 3, 1881, in consequence whereof have projected, and have constructed, and are constructing, a continuous system of public works, for the purpose of so confining the flood waters of the river between lines of embankment, or levees, as to give increased elevation and velocity and force, to the currents, in order to scour and deepen
15 the channel, and have thus caused an increased and abnormal elevation of at least nine feet to the waters of the river at the high water or flood stage; and for said purpose have adopted and made use of systems of public and private levees, originally constructed for the reclamation of overflowed lands, on the west bank from the highlands of Arkansas to the mouth of the Red River, and from the mouth of the Red River to the Passes, except the Bougere, Morganza and other crevasses furnishing natural outlets for the flood waters, but from the mouth of the Yazoo River at Vicksburg, Mississippi, to Baton Rouge, instead of adopting and constructing levees, have made use of and adopted the highlands skirting the river for said purpose, and have thus placed the lands of the claimants and others similarly situated, between the lines of embankment with an increased grade of 23.4 feet, in the adopted high water bed of the river, and exposed to the full force of the currents of the river, with such increased elevation and velocity and force, on the ground that it is better to destroy and pay for the lands than to protect them, and have frequently acknowledged their responsibility and recommended that Congress make some provision for the adjustment of the equitable claims of the land owners in such cases, but that Congress has neglected to make such provision.

(11) That in pursuance of their said plan the officers and agents of the United States have constructed, and maintain, a system of levees from Helena to the mouth of the White River, and from the highlands of Arkansas to the Louisiana line, and have thus prevented the flood waters of the Mississippi River from
16 passing into the Bayous Macon and Tensas and Boeuf, Ouachita and Atchafalaya Rivers, where they were wont to flow in times of high water, and have confined all the flood waters within the main channel, made much narrower, and have brought them down on the lands of the claimants, between the levees on the west bank and the highlands on the east bank, and have thus caused a much greater volume to pass over the lands of the claimants than ever before, and to raise the river at that point much higher.

(12) That in pursuance of their said plan the officers and agents of the United States proceeded to close the outlets, by which in times of high water the flood waters escaped into the basins, and constructed and maintain levees at the most important stations on the river, and have thus prevented the flood waters from passing into the Tensas and Atchafalaya Basins, where they were wont to flow in times of high water, and have confined all the flood waters within the main channel, made much narrower, and have so obstructed, and are so obstructing, the passage of the flood waters

below, as to cause the waters of the river at the flood stage to back up and overflow the lands of the claimants.

(13) And are so raising, enlarging and strengthening, adding to and constructing such levees, as to cause the lands of claimants and others so situated, to be flowed annually by the waters of the river thus confined, and to destroy the crops growing and grown thereon, and to drown the live stock, and to undermine and wash away the buildings, fences and other improvements, and to fill up the drains and ditches and to wash off the soil, and to cover the lands with superinduced additions of water, earth, sand and
17 gravel, and to render them unfit for cultivation, and to entirely destroy their value.

(14) That the officers and agents of the United States, in pursuance of their said plan, have checked the enlargement and limited the outlet capacity of the Atchafalaya River, estimated to carry off one-fourth of the flood waters of the Mississippi River, and have closed the Bougere Crevasse, which was 29 miles in length and had been open since 1859, and extending the levee line on the west bank twenty-six miles down to the mouth of Red River, and have thus caused, and will continue to cause, an increased and increasing volume of flood waters to pass over the lands of the claimants, and after expending more than $25,000 in private levees in the effort to protect their property from the destructive effects of the works of the United States, they find it beyond their power and beyond the power of any private person, to construct and maintain levees sufficiently high and strong for that purpose.

(15) That the plantations of petitioners are located within the limits of a narrow strip of land lying between the low water bank of the Mississippi River and the highlands east of it between Vicksburg and Baton Rouge, where the highlands skirt very closely to the river bank and are not protected by levee construction other than that built by the claimants, which has been destroyed and washed away by the recent flood waters of said river after the levee system had practically reached a state of completion and the United States had closed the Bougere Crevasse, as hereinafter alleged.

(16) That the United States has not attempted to connect the levee line on the east side of said river by the construction
18 of levees on said irregular and narrow strip of land lying between Vicksburg and Baton Rouge for the reason that the cost of said levee construction, as shown by the Mississippi River Commission's Report for 1896, and the report and survey of the small basins in the Homochitto levee district between Ellis Cliff and Fort Adams, made in 1895 by Col. Geo. B. McC. Derby, the engineer officer in charge of said district, would exceed the value of the land lying between the river and the foot-hills, (of which petitioners' lands are a part), to the amount of $206,500.00, it being more economical to use the foothills as levees, as now being done, and pay for the land destroyed, than to build levees on the east bank of said river between said city of Vicksburg and the city of Baton Rouge. That the Mississippi River Commission, in its report for the year 1910, in part says that the lands of petitioners are now subject to perpetual inundation.

That the extension of said levee system on both banks of said river by the United States from Cape Girardeau, Mo., to the Head of the Passes was authorized by Act of Congress in 1906 as shown in 34 Stat. L., p. 208.

(17) That the Bougere Crevasse was a break in the river bank located in the State of Louisiana on the opposite side of the river from the Jackson land, fu-nishing an outlet for flood waters in times of high water. This crevasse in said bank occurred during the flood of 1859 and remained entirely open until the year 1902, when efforts to close it were commenced by the United States, the closing of which was completed on June 28, 1910 by the United States, thus giving a continuous line of levees in the lower Tensas levee district as far down as Point Breeze, about 9 miles above Old River.

That the levee line connecting with the Bougere levee opposite petitioners' lands, many miles above said lands, and the levee line connecting with the Bougere levee, many miles below, were joined by the United States, thus making a continuous line of levees opposite the Jackson land of 23.4 feet in height or from 8 to 10 feet above the highest known water, which levee, when completed, obstructed the natural flow of the flood waters of said river into their natural outlets and basins and backed the same on to the lands of petitioners, producing an increased flood height of 9 feet or more on their lands.

(18) Before the joining of the levee lines by the United States in accordance with the Eads plan, thus making the same continuous, and before the Bougere Crevasse was closed by the United States, there were occasional overflows of petitioners' lands but they have been made deeper, more frequent and more forceful by the adoption and completion of said levee system, which overflows, before the adoption of said system and the closing of said Bougere Crevasse, did not materially damage said land and it still remained valuable for agricultural purposes.

From 1896 to 1907, while the levee line opposite petitioners' lands was down and the Bougere levee uncompleted, and before levee construction reached a state of completion, your petitioners, with the aid of private levees theretofore constructed on their lands and by replanting after overflows, were able to raise partial crops of cotton, corn and other products, but by offsetting losses against profits from the cultivation of said land during that period, shows that it was not profitable to cultivate the same, and that petitioners in their attempt to so cultivate said land lost many thousands of dollars.

In the year 1908 your petitioner, E. H. Jackson, put in cultivation 1,650 acres on Jackson Point, Alloway and Wakefield plantations, of which 1,150 acres were in cotton and 500 acres in corn, costing him $6,000 to prepare and plant said crops. These crops were destroyed by the flood waters of 1908.

That in the same year 1908 your petitioner, Mattie W. Jackson, put in cultivation on her lands at Jackson Point 600 acres, of which 500 acres were in cotton and 100 acres in corn, costing $2,500 to

prepare and plant said crops. These crops were destroyed by the flood waters of 1908.

That in the year 1909 your petitioner, E. H. Jackson, had in cultiva-ion only 500 acres of said land, of which 300 acres were in cotton and 200 acres in corn. That a flood came in April of that year and destroyed these crops. That petitioner replanted 300 acres of said land; that another flood came in June of that year and took a part of said crop, so that he was only able to raise and gather 10 tons of pea hay and about 1,500 bbls. of corn, the cotton crop being destroyed by the flood waters of that year. That it cost him $7,500 to make and gather the crops of 1909.

That in the same year 1909 your petitioner, Mattie W. Jackson, had in cultivation 300 acres of said land, of which 200 acres were in cotton and 100 acres in corn, costing her $2,000 to plant the same. That a flood came in April of that year and destroyed her crops, except about 40 acres of cotton. That another flood came in May of that year and continued too late to plant cotton. That another high water came in August of that year which had the effect of keeping the water on the land which was already there from previous overflows of April and May of that year. That for 1909 she was able to gather only 10 bales of cotton and 300 bbls. of corn.

That said lands were overflowed three times in 1907, four times continuously in 1908 for a period of 120 days, and three times successively in 1909. That said lands are practically of the same elevation as other lands adjacent thereto bordering on the said river on the same side thereof, for many miles above and below said land. That the levee system on the pposite side of the river, above and below said land, having now reached a state of completion, it is now no longer practicable for petitioners to protect said lands by private levees.

(19) That the effect of the frequent and successive overflows of said lands in the years 1907, 1908 and 1909 as aforesaid was to drive away the tenants, cover 1,700 acres thereof with sand deposits from 6 inches to 6 feet in depth; that said lands then grew up in weeds, young willows and cottonwood from 6 feet to 15 feet in height; that the buildings, houses and cabins on said lands were damaged to the extent of some of them being lifted from their foundations and washed into the fields, the floors torn up, the fences on the lands washed away and torn to pieces by the swift currents of the water running through and over said lands; and that said lands have been destroyed and now have no commercial value whatever.

That petitioner, E. H. Jackson, has lost at least the sum of $50,000 in his effort to cultivate his part of said lands during the years of 1907, 1908 and 1909.

(20) That by reason of the premises the lands of the claimants which before the undertaking by the United States to improve the river were, from their natural situation, comparatively high and secure from overflow, and were flowed only three times in the twenty years from 1870 to 1890, have been flowed by the flood waters of the river, thus confined, in the years 1890, 1891, 1892,

1893, 1897, 1898, 1899, 1903, 1904, 1906, 1907, three times, and in 1908 continuously for a period of 120 days, and three times successively in 1909, when with the volume of flood waters in the river they would not have been so flowed, except for the works of the United States aforesaid, and the crops growing and grown thereon have been each year destroyed by said overflows, so caused, and the live stock drowned, and the buildings, fences and other improvements undermined and washed away, and the drains and ditches filled up, and the soil washed off, and the lands covered with superinduced additions of water, earth, sand and gravel, so as to render them unfit for cultivation, and to entirely destroy their value.

(21) And your petitioners say that this precipitation and this backing of the flood waters of the river, by the works of the United States for the improvement of the navigation of the river, so as to flow the lands of the petitioners, and to destroy the crops growing and grown thereon, and to drown the live stock, and to wash away the buildings, fences and other improvements, and to fill up the drains and ditches, and to wash off the soil, and to cover the lands with superinduced additions of water, earth, sand and gravel, so as to render them unfit for cultivation, and to entirely
23 destroy their value, is such a serious interruption to the common and necessary use of the property as to be equivalent to a taking within the meaning of the Constitutionl provisions, and being done in pursuance of the acts of Congress, authorizing it for the public benefit, and under the direction of the Mississippi River Commission, and the Secretary of War, by the officers and agents of the United States, after adopting and utilizing levees built by state and local authorities, imposes on the Federal Government an implied obligation to make compensation for the property so taken and destroyed.

(22) That no other action than as aforesaid has been had on this claim in Congress or by any of the Departments.

(23) That the claimants are the sole owners of this claim, and the only persons interested therein; and that no assignment or transfer of this claim, or any part thereof, or interest therein has been made.

(24) That the claimants are justly entitled to the amount herein claimed from the United States after allowing all just credits and offsets.

(25) That the claimants are citizens of the United States, and believe the facts stated in this petition to be true.

And the claimants ask judgment for said sum of three hundred thousand dollars ($300,000.00).

MATTIE W. JACKSON, *Widow*, AND
WILLIAM GRAHAM JACKSON, AND
GLADYS L. JACKSON,
Infants, Who Sue by Mattie W. Jackson, Their Next Friend, AND
ERNEST H. JACKSON,
Petitioners,
By WAITMAN H. CONAWAY,
Attorney for Petitioners

DISTRICT OF COLUMBIA,
City of Washington, ss:

Personally appeared before the undersigned authority, John Randolph, Assistant Clerk of the Court of Claims of the United States, Waitman H. Conaway, who being by me first duly sworn, upon his oath says, that he is the attorney of record for petitioners in the above styled case in the Court of Claims under and in pursuance of a power of attorney in writing, duly executed by petitioners and filed in said suit on the 12th day of October, 1911; that he has read the above petition and is acquainted with the contents thereof, and that the matters and things therein stated are true to the best of his knowledge, information and belief.

WAITMAN H. CONAWAY,
Attorney of Record.

Subscribed and sworn to before me this 25th day of January, A. D. 1912.

JOHN RANDOLPH,
Assistant Clerk Court of Claims.

24 *VII. Traverse.*

Filed March 15, 1912.

In the Court of Claims of the United States, December Term, A. D. 1911.

No. 18274.

MATTIE W. JACKSON et al.
vs.
THE UNITED STATES.

And now comes the Attorney General, on behalf of the United States, and answering the petition of the claimants herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

JOHN Q. THOMPSON,
Assistant Attorney General.

VIII. Further History of Proceedings.

On May 6, 1912 claimants' motion for new trial overruled; claimants' motion to amend findings of act allowed in part and overruled in part; amended findings of fact and revised opinion by Booth, J., this day filed, nunc pro tunc, as of December 4, 1911. The judgment as entered to stand. Howry and Barney, JJ. dissenting.

On May 8, 1912 the claimants filed a motion to amend findings of fact.

On June 17, 1912 the Court filed an order setting aside order of May 6, 1912. Claimants' motion for a new trial allowed. Claimants' and defendants' motions to amend findings allowed in part and overuled in part. Former findings and opinion withdrawn new findings this day filed with conclusion of law dismissing petition. Opinion by Booth, J. Howry and Barney, JJ. dissenting,

Said findings and opinions are as follows:

25 *IX. Findings of Fact and Conclusion of Law and Opinion by Booth, J., and Dissenting Opinions by Howry and Barney, JJ.*

Filed June 17, 1912.

MATTIE W. JACKSON, Widow; WILLIAM GRAHAM JACKSON and GLADYS L. JACKSON, Infants; and ERNEST H. JACKSON

v.

THE UNITED STATES.

This case having been heard by the Court of Claims, the court, upon the evidence, makes the following:

Findings of Fact.

I.

The alluvial valley of the Mississippi extends from Girardeau, Mo., on both banks, to the Gulf of Mexico, varying in width from 4 to 40 miles above the mouth of Red River, and to a much greater distance below.

It is topographically divided into six large basins, of which four are on the west bank and two on the east bank, and into many small basins.

The St. Francis Basin extends from Cape Girardeau to Helena, Ark.

On the west bank at Helena the White River Basin begins and extends to the mouth of the Arkansas River, and there are no highlands on the west bank of the river near the mouth of the Arkansas River, and but for that river there is no natural physical line of demarcation between White River Basin and the Tensas Basin.

Below the Arkansas River and still on the west bank lies the Tensas Basin, extending to the mouth of Red River, and there are no highlands, on the west bank of the river near the mouth of the Red River, and but for that stream there is no natural physical line of demarcation between the Tensas Basin and the Atchafalaya Basin.

From Cairo to a short distance below Memphis, Tenn., on the east bank, the hills crowd closely to the river and form small basins, which prevent any large escape of high water.

On the east bank, a short distance below Memphis, the Yazoo Basin begins, and extends to Vicksburg, Miss.

On the east bank from Vicksburg to Baton Rouge the highlands

abut on the river at Grand Gulf, Rodney, Coles Creek, Natchez, Ellis Cliff, Fort Adams, Tunica, St. Francisville, Port Hudson, and Baton Rouge, still further dividing this stretch of territory into smaller basins.

Below the Red River, and still on the west bank, the Atchafalava Basin extends to the Gulf, and on the east bank the Pontchartrain Basin extends from Baton Rouge, La., to the Gulf.

These small basins on the east bank are shallow, and there is no escape for the flood waters of the river which flow into them, except to return to the river at and above the foot of each basin.

The Jackson lands are situated at Jackson Point, in the Homochitto Basin, on the left bank of the river, 40 miles below Natchez and 25 miles above the mouth of Red River, and are located within the limits of a narrow strip of land lying between the Missis-
26 sippi River and the highlands east of it between Vicksburg and Baton Rouge, where the highlands abut on the river at Grand Gulf, Rodney, Coles Creek, Natchez, Ellis Cliff, Fort Adams, Tunica, St. Francisville, Port Hudson, and Baton Rouge, and said lands are not and have not been protected by levee construction other than that built by claimants, which has been destroyed by flood waters in recent years.

II.

Mary E. Jackson owned and possessed during her lifetime and at the time of her death the plantations described in the petition as Jackson Point, Alloway, Cerro Gordo, and Black Hills.

By the last will and testament of Mary E. Jackson, bearing date September 25, 1887, she devised said lands to her son, E. H. Jackson, and appointed her husband, William L. Jackson, testamentary executor, but her husband, as provided by the statutes of Mississippi, renounced the will and took a child's portion, and he and his son, E. H. Jackson, acquired the lands as tenants in common.

William L. Jackson died in 1895, testate, and by his last will and testament, bearing date January 19, 1896, devised one-fourth of his interest in said land to said E. H. Jackson and the other three-fourths interest in said land to his widow (he having been married a second time), Mattie W. Jackson, for life, with remainder in fee to William Graham Jackson and Gladys L. Jackson, the two children of the marriage, the widow administering on his estate.

III.

Said land was partitioned among the owners thereof by judicial decree of the chancery court of Adams County, Miss., on December 15, 1896, each of the tenants taking his and her shares in severalty, said E. H. Jackson taking five-eighths and said Mattie W. Jackson taking three-eighths, and since that time said lands have been cultivated in severalty.

The decree of the chancery court of Adams County, Miss., entered December 15, 1896, confirming the commissioners' report partitioning said lands, describes the same as follows, to wit:

To Mattie W. Jackson, as follows:

"1st. That certain plantation of land commonly known as 'Cerro Gordo,' situate in said county of Adams and State of Mississippi, in 'Dead Man's Bend' on the Mississippi River, said plantation being bounded on the north by lands of the estate of Wm. McElroy, on the east by lands (formerly) of Holliday & Graham, on the south by lands (formerly) of W. H. Dunbar, and on the west by the Mississippi River, containing 200 acres, more or less.

"2nd. That certain tract of land situate in said State of Mississippi, county of Adams, on the Mississippi River, known as the 'Black Hills' plantation; bounded on the north by said Mississippi River; east and south by lands formerly of Mary E. Jackson, deceased, and Annie M. Helvey, and west by lands of Jacob Miller, containing 57.25 acres, more or less, and with courses and distances as shown by a certain map of record in Book 3-E, page 609, of the records of deeds of said county of Adams, made by C. W. Babbit, C. E., being the same tract of land sold and conveyed to Ernest H. Jackson and William L. Jackson, deceased, by Henry Frank, trustee, by deed dated the 5th of December, 1892, and recorded in Book 3-H, page 733, of said records of deeds.

27 "3rd. All that certain plantation of land lying, being, and situate in the county of Adams, State of Mississippi, on the Mississippi River, in that portion of said county known as 'Dead Man's Bend,' said plantation being called and known as 'Alloway,' and containing, with the exceptions hereinafter mentioned, the following tracts, to wit:

"The south half, the northwest quarter, and the west half of the northeast quarter of section six (6), township three (3), range four (4) west, containing 568.27 acres entered by Thos. Lewis, Polly Williams, W. H. Edwards, and Leo Tarleton. Also lots one (1), two (2), three (3), and four (4), fractional section eighteen (18), township four (4), range four (4) west, containing 314.41 acres, entered by Samuel Martin and Lewis & Barnard. Also lot six (6) of fractional section one (1), township four (4), range five (5) west, containing 80 acres, entered by James Swing. Also the north half of section one (1), township three (3), range five (5) west, containing 322.50 acres. Also lots three (3), four (4), and five (5), township three (3), range five (5) west, containing 240 acres, in all about 1,524 acres (originally). Excepting, however, that certain piece or parcel of land containing 270 acres, set off to Ernest H. Jackson and more particularly described as follows, to wit:

"Beginning for northeast at a point on the Mississippi River at the north end of a ditch at a point designated A on said map; thence south 3° east along the center of said ditch about 28 chains to its southern end, where is planted an iron post on the bank, and on same course about 49 chains in all to an iron post planted on the south boundary of 'Alloway' at point marked B on said map; thence west through the middle of section 1, T. 4, R. 5, 48.20 chains to a large gum tree, at the point C on said map, on the west bank of a canal and marked x x, and old-established corner; thence north between sections 1 and 2, T. 3, R. 5 W., 40 chains to an iron post and

on 25 chains more, between sections 1 and 2 of T. 4, R. 5 W., to the bank of the Mississippi River at the point D on said map; thence southeasterly along the river to the place of beginning; being the tract shaded yellow on said map; and designated thereon by the words and figures '270 acres of Alloway set off to E. H. Jackson.'

To Ernest H. Jackson, as follows:

"1. That certain plantation of land, lying, being, and situated in said county of Adams, State of Mississippi, in that part of said county known as 'Dead Man's Bend' on the Mississippi River, called and known as 'Jacksons Point,' containing the following tracts, to wit:

"Lots one (1), two (2), three (3), four (4), five (5), and six (6) of fractional section two (2), township four (4), range five (5) west, containing 548 acres. Also the northwest quarter of fractional section two (2), township three (3), range five (5) west, containing 158.62 acres. Also fractional section three (3), township four (4), range five (5) west, containing 126 acres; in all, 832.62 acres; also the batture in front of said section 3, T. 4, R. 5 west, as shown on said map.

"2. All that certain piece or parcel of land containing 270 acres, heretofore a part of the 'Alloway' plantation, and more particularly described as follows, to wit:

"Beginning for northeast corner at a point on the Mississippi River at the north end of a ditch at the point designated A 28 on said map; thence south 3 degrees east along the center of said ditch about 28 chains to its southern end, where is planted an iron post on the bank, and on same course about 49 chains in all to an iron post planted on the south boundary of 'Alloway' at point marked B on said map; thence west through the middle of section, 1, T. 4, R. 5, 48.20 chains to a large gum tree, at the point C on said map, on the west bank of a canal marked XX, an old-established corner; thence north between sections 1 and 2 of T. 3, R. 5 W., 40 chains to an iron post, and on 25 chains more between sections 1 and 2 of T. 4, R. 5 W., to the bank of the Mississippi River at the point D on said map; thence southeasterly along the river to the place of beginning; being the tract shaded yellow on said map and designated thereon by the words and figures "270 acres of Alloway set off to E. H. Jackson.'"

The value of the Cerro Gordo plantation and a portion of the Alloway plantation, containing, in all, six parcels, aggregating 1,702.42 acres, more or less (being the land decreed to Mattie W. Jackson for and during her natural life, with remainder in fee to William G. Jackson and Gladys L. Jackson, the two children of her marriage with William L. Jackson), is $51,072.90.

The value of the lands decreed to Ernest H. Jackson, as set out above, being the Jackson Point plantation and a portion of the Alloway plantation, aggregating 1,102.62 acres, is $33,078.60.

IV.

On the 30th day of December, 1899, Ernest H. Jackson purchased from George M. Brown and Rufus L. Learned, for the sum of $13,000, the Wakefield plantation, described in said deed of conveyance as follows:

"All that certain tract of land situated, lying, and being in the county of Adams, State of Mississippi, and now known as Wakefield plantation, being lot No. 3 of the original Wakefield plantation, which was allotted and set apart to Brown & Learned of the first part by the final decree of the chancery court of Adams County, rendered October 24th, 1891, in that certain partition suit styled Mary C. Dunbar et al. v. Ida Dunbar et al., numbered 1004 on the general docket of said court, said final decree being of record on pages 768-770 of Book 3-H of the records of deeds of said Adams County. Said lot No. 3 at time of rendition of said decree contained 240 acres of open land and 1,170 acres of batture, in all 1,460, as will appear from the map of Wakefield plantation filed in said cause and of record on page 451 of Book M of final records of chancery court, and it is described in said final decree as follows, to wit: Lot No. 3, beginning at SE. corner at corner of sections 4 and 5 post, where a china tree bears N. 7° E. 50 feet; thence with line of the Baker tract N. 1° 25′ W., 82 chains to SW. corner of lot No. 2 of Wakefield, and on same course with lot No. 2 about 30 chains to Canal Bayou; thence along Canal Bayou, and the middle of the slough previously mentioned, with lot No. 1 to NW. corner of lot No. 1; thence west with W. L. Jackson 7.00 chains to an iron post to mark the 1¼ section corner of sections 2 and 3; thence N. 1° 25′ W., still with W. L. Jackson, 40 chains to iron pin on township line to mark corner of 2 and 3; thence west on township line at 13.70 chains is stake in road, where a china tree bears N. 64° E. 48 links at 43 70/100, cross a wire fence 80.00 is on bank of Mississippi River, where
29 cottonwood XS. 25° E. 18.00 north 23.00 N. 38½ E. 35; thence down the river to south boundary of section 4 and with it east to the beginning; also all the batture and alluvial deposits lands now connected to or belonging to said lot No. 3 of original Wakefield plantation."

The value of the Wakefield plantation, containing 1,460 acres, is $43,800.

V.

The basin in which the Jackson lands are situated commences at Ellis Cliffs, about 20 miles below Natchez, and extends to Fort Adams, about 50 miles below, with an average width of 2 miles and a maximum width of 6 miles, and is known as the Homochitto Basin.

In the report of the Mississippi River Commission for 1894 (pp. 2713-2714), to which reference is here made, when treating of the Homochitto levee district it says:

"The commission is also advised of the pendency of a suit in the Court of Claims by the owners of a plantation within said district

claiming damages for injury by overflow. * * * In the copy of the petition in said cause, furnished to the commission by the Department of Justice, it is alleged that the omission of the United States to construct levees along the front of the land of petitioners constituted an adoption of the bluff behind the lands for the purpose of the levees and an appropriation of petitioners' land for public use."

In 1895 and 1896 the Mississippi River Commission caused a complete survey to be made of the Homochitto levee district by Col. Derby, the engineer officer in charge. The report of Col. Derby will be found on pages 3472-3473 of the commission's report for 1896, and the maps made as a result of said survey will be found in Appendix 13 to said report, to all of which reference is here made. On page 3473 of said report, and on map (pl. 4) accompanying Col. Derby's report, it is shown that the claimants' lands are located in that small basin between Ellis Cliff and Fort Adams, and that the cost of building levees within that basin was at that time greater than the value of the land which such levees would protect and other lands would not be protected thereby.

In the report of the Mississippi River Commission for 1896 (p. 3418), to which reference is here made, the commission says:

"Since the date of the last report complete surveys of the several minor basins comprising this levee district have been made. The general conclusion from these is that the frontage of these districts along the river is so short that the back water of floods entering through the opening left at the lower end for local drainage of the basin, and that coming from the hills, will reach to the inner foot of the levee and submerge nearly, if not all, of the inclosed land.

"Complete reclamation of these lands is, therefore, only practicable by treating them as polders and establishing an artificial drainage by pumps and floodgates. The surveys further show that the cost of the levees in most cases far exceeds the value of the land. Their area is so small that it can hardly be contended that their leveeing is important to the improvement of the navigation of the river."

In the Homochitto levee district, from Vicksburg to Baton Rouge, on the east side of the river the foothills are so located as to serve, and do serve, the purposes of a levee line in said district in times of high water, and the Government has not constructed any levees in that district.

In the annual report of the Mississippi River Commission for 1910 (pp. 2937-2938), reference to which is here made, that commission in part says:

"The attention of Congress has been called in former reports, beginning as far back as 1894, to the situation of the narrow and irregular strip of land lying between the Mississippi River and the highlands east of it between Vicksburg and Baton Rogue—a distance of 234 miles by the river.

* * * * * * *

"It appears to the commission that there are three possible ways of dealing with the problem. One is to assist the owners of the inun-

dated lands by helping them to build levees where that method of protection is economically possible. Another is to compensate them in damages for the injuries which they have sustained. A third would be to buy the lands and devote them to forestry. There is more to be said in favor of the last of these suggestions than might appear at first blush. The lands are capable of growing many kinds of valuable timber. They could be made to produce much material for revetment and other works of improvement in the river. If the fields were abandoned to natural growth the land would be gradually built up by deposit and they might become highly valuable for cultivation."

During times of high water and overflow the water from the Mississippi River flows over the claimants' said land and leaves a deposit of silt and sand thereon and has done so during seasons of high water and during times of overflow, which is shown by the gauge readings for various years as far back as the year 1828, which is as follows:

Years.	Cairo.	Helena.	Lake Providence.	Vicksburg.	St. Joseph.	Natchez.	Red River landing.
1828	.....	43.11	.....	46.38	.....	48.4	.....
1844	.....	42.21	.....	46.18	.....	47.8	.....
1849	.....	42.81	.....	46.38	.....	47.5	.....
1850	.....	42.81	.....	47.08	.....	45.3	.....
1858	49.56	44.61	.....	46.98	.....	47.8	.....
1859	46.8	43.61	.....	48.28	.....	49.0	.....
1862	50.76	46.40	40.87	51.10	.....	50.3	.....
1865	47.9	44.40	.....	46.43	.....	.....	.....
1867	51.0	45.82	39.99	49.02	.....	47.9	.....
1868	45.6	.....	.....	.....	.....	.....	.....
1871	.....	.....	.....	.....	.....	43.8	.....
1872	39.20	39.03	35.15	39.50	.....	39.85	39.42
1873	41.55	40.00	36.12	40.60	.....	40.15	39.02
1874	47.37	45.82	37.37	45.70	.....	45.60	47.0
1875	45.12	42.40	37.29	43.0	.....	41.85	40.45
1876	46.38	44.85	37.95	44.90	.....	43.85	45.41
1877	40.52	41.80	35.82	41.60	.....	40.70	40.55
1878	37.04	38.75	35.80	40.95	.....	39.2	.....
1879	36.50	37.25	36.0	39.45	.....	36.8	35.90
1880	44.60	43.70	38.05	43.15	.....	43.5	44.05
1881	45.80	43.74	36.17	41.85	39.2	40 8	40.10
1882	51.87	47.20	38.32	48.75	44.9	47.75	48.50
1882	52.17	46.90	36.47	43.80	41.9	44.0	45.20
1884	51.79	47.00	38.40	49.0	44.98	47.4	47.30
1885	39.0	40.70	35.55	42.4	38.37	42.6	41.96
1886	51.02	48.10	37.91	44.15	.....	43.75	41.94
1887	48.50	46.40	38.01	44.70	.....	44.2	43.0
1888	45.35	42.80	38.10	44.18	.....	43.4	41.75
1889	34.53	34.10	29.40	34.45	30.60	34.15	33.94
1890	48.80	47.72	41.05	49.05	45.15	48.6	48.6
1891	46.21	44.70	41.00	48.10	43.80	46.5	45.5
1892	48.29	45.73	41.90	48.45	44.85	48.1	48.8

31 Years.	Cairo.	Helena.	Lake Providence.	Vicksburg.	St. Joseph.	Natchez.	Red River landing.
1893	49.33	47.92	41.85	48.30	44.10	46.8	47.7
1894	37.0	38.07	34.40	40.90	36.90	40.6	39.05
1895	33.0	31.30	25.90	31.70	27.85	31.5	31.2
1896	39.2	38.42	33.25	39.0	35.15	38.2	37.4
1897	51.62	51.75	44.54	52.48	47.85	49.8	50.2
1898	49.78	49.11	44.35	49.4	45.06	47.4	44.3
1899	46.24	46.75	41.65	47.3	43.25	46.15	43.3
1900	39.17	38.25	32.95	38.0	33.7	37.0	36.3
1901	43.20	41.45	36.45	41.5	36.9	39.8	37.3
1902	42.14	39.58	34.95	41.22	37.15	40.25	38.8
1903	50.57	51.00	46.48	51.8	48.07	50.35	50.08
1904	49.01	47.62	42.5	46.85	42.75	45.50	43.7
1905	38.56	37.77	36.5	40.75	37.4	41.27	40.77
1906	46.90	47.05	43.7	47.15	43.75	46.7	44.7
1907	50.33	50.39	46.3	49.65	46.15	48.9	46.9
1908	45.55	45.2	44.1	47.8	44.75	48.9	48.74
1909	47.27	47.65	44.3	48.0	45.15	47.91	46.04
1910	42.2	40.7	36.9	40.6	36.3	39.8	38.5

VI.

The Jackson lands have been entirely overflowed in the years 1890, 1892, 1893, 1897, 1903, 1907, 1908, and 1909, and partially overflowed in the years 1891, 1898, and 1906, and only saved from overflow by the private levee of Jackson in 1899 and 1904.

That said lands were partially overflowed in 1906, overflowed three times in 1907, five times continuously in 1908 for a period of 129 days, and two times successively in 1909, it requiring a flood stage of 43 feet on the river gauge at Natchez to reach and flow the Jackson land.

The effect of the frequent and successive overflows in the years 1906, 1907, 1908, and 1909 was to drive away the tenants, cover 1,700 acres thereof with sand and silt deposits from 6 inches to 6 feet in depth; said land has grown up with weeds, young willows, and cottonwood from 6 to 15 feet in height; many of the buildings, houses, and cabins formerly on said lands have been lifted from their foundations and washed into the fields, the floors torn up, the fencing on said land washed away and torn to pieces by the swift currents of the water running over said land; and that said lands have been destroyed for agricultural purposes and have no market value.

VII.

Prior to the year 1890 the unprotected lands of claimants could be, and were, successfully and profitably cultivated during certain years. Since the year 1890, and by reason of the efforts of the United States to improve the navigation of said river along and in front of the land of claimants in the interest of navigation and commerce, in pursuance of various acts of Congress, and by closing up the natural outlets along said river existing prior to that time, the overflows from the waters of said river are now occurring at more frequent intervals and for a longer duration.

From 1870 to 1890 there had been great floods in the years 1874, 1882, and 1884, which partially and fully flowed the Jackson lands, but that the occurrence of such overflows did not materially affect their productive capacity or impair their value.

32 VIII.

All the efforts of the State and local authorities on the west bank of the Mississippi River, near the land of claimants, had never succeeded in erecting and maintaining levees on that bank sufficiently high and strong to hold the flood waters in the channel of the river, and therefore claimants' lands were flowed for a short time only, the waters escaping through the natural outlets and crevasses into the basins and from said basins into the Gulf of Mexico.

The combined work of the United States, States, local authorities, corporations, and private owners did not succeed in preventing crevasses in the general levee system along the Mississippi River until the year 1908, the first flood year without a crevasse in the levees.

IX.

From time immemorial the waters of the Mississippi River during the highest stages thereof, when not contained within the low-water banks of the river, naturally found outlet below Cairo into the St. Francis Basin and below the highlands near Helena, Ark., in the White River, Yazoo, Tensas, Atchafalaya, and Pontchartrain Basins, and through the rivers draining these basins eventually into the Gulf of Mexico. The outlets and drains thus provided by nature were such as to accommodate said flood waters, and the lands of claimants were not overflowed as frequently before the outlets were closed by levee construction by the United States to improve the river navigation, and by the State and local authorities to protect and reclaim land subject to overflow in times of high water, and consequently were but little injured by said overflows.

X.

Prior to the year 1883 the States and local authorities had constructed unconnected lines of levees for the protection and reclamation of lands subject to overflow from the mouth of Red River to the mouth of Arkansas and from the mouth of the Yazoo to the highlands below Memphis. The flood waters of 1882 destroyed miles of these levees.

Beginning about the year 1883 and continuing to the present time, the officers and agents of the United States, pursuant to an act of Congress creating the Mississippi River Commission and the other acts amendatory thereof, and for the improvement of the Mississippi River for navigation, adopted a plan, the so-called Eads plan, and in consequence thereof have projected and constructed and maintain- and are now engaged in constructing and maintaining certain lines of levees on both sides of the river at various places for various distances from Cairo, Ill., to near the Head of the Passes, a distance of 1,050 miles by river from Cairo, and the local authorities or organizations of the States bordering along the river on both sides from Cairo to the Gulf have before and since 1883 constructed and are now constructing and maintaining certain lines of levees at various places and of various lengths for the purpose of protecting and reclaiming lands within their respective districts from overflow in times of high water.

33 The levee lines so constructed by the United States and local authorities have been joined, thus giving a continuous line of levees, as contemplated by the Eads plan, with the result that the flood waters of the Mississippi River to a great extent are confined within and between said levee lines and encompassed within a narrower scope than heretofore, acquired an increased velocity and higher elevation and the current thereof has become stronger and more forceful.

The plan of the officers and agents of the United States so acting was to increase said velocity and scouring power of the water and to scour and deepen the channel of the Mississippi River and thereby improve it for navigation, and the purpose of the officers and agents

of the State and local authorities constructing lines of levees at various points along and on both sides of the river was to reclaim and to protect land from overflow in times of high water. By so doing, the waters being thus confined within a narrower compass, as above indicated, have attained a higher elevation of approximately 6 feet in times of high water.

XI.

From Cairo, Ill., to near the mouth of the Yazoo River, just north of Vicksburg, the Mississippi River is practically leveed on both sides, except on the east side, where the highlands abut on or near the river in Kentucky and Tennessee (from Port Jefferson, Ky., to a short distance south of Memphis, Tenn.) and thence on the west side to near the Head of the Passes, or to a point 1,050 miles by the river from Cairo, and on the east side from Baton Rouge to the same point near the Head of the Passes, leaving a gap in the line of levees of 234 miles in length, from the mouth of the Yazoo River to Baton Rouge, unleveed, where the foothills in some places hug closely to the east bank of the river, and at other points are from 2 to 6 miles from the river, in which strip of territory the lands of claimants are located between the highlands and the river, as before stated.

The extension of the general levee system by the United States and the local authorities, since the United States adopted to its use and assumed "permanent control" of the levees theretofore constructed by State and local authorities, has resulted in an increased elevation of the general flood levels, which subjects the claimants' lands to deeper overflow than they were subject to formerly, or would be subject to now, if the levee system were not in existence, and consequently has destroyed its value for agricultural and grazing purposes, causing its abandonment for that purpose since the year 1908. The immediate cause of the deeper overflow of claimants' land is the increased elevation of flood heights which is the result of the general confinement of the flood discharge by the levee system as a whole.

XII.

During the flood waters of 1882, the levees failed throughout the length of the river. In 1884, the crevasses were still open in the basins. In 1886, crevasses were open in the Upper Tensas district and the levees practically intact in the Lower Yazoo district opposite the Upper Tensas. In 1887, all crevasses were closed. In 1890, there were eight crevasses in the Upper Tensas and seven in the Lower Yazoo districts. In 1891, all 1890 crevasses were closed and the flood waters of that year made one crevasse in the Upper
34 Tensas and one in the Lower Yazoo districts. In 1892, all crevasses were closed, but the flood waters made six crevasses in the stretch of river in the Upper Tensas district. In 1893, all crevasses were closed, but the flood waters of that year made four crevasses. In 1897, all crevasses were closed, but the flood waters of that year made five crevasses in the Lower Yazoo district in Mississippi. From 1898 to 1902, there were no crevasses, and only one crevasse in the Upper Tensas district in 1903, and all crevasses closed from 1904 to 1910.

XIII.

Before the joining of the levee lines by the United States in accordance with the Eads plan (thus making the same continuous), there were occasional overflows of claimants' land, but they have been made deeper, more frequent and more forceful by the adoption and completion of the levee system. However, these overflows, before the adoption of said system, did not materially damage said land and it remained still valuable for agricultural purposes.

XIV.

From 1896 to 1908 there was raised and sold on the Jackson land the following crops of cotton:

Season.	Bales.	Value.	Season.	Bales.	Value.
1896-97	707	$25,960.42	1903-4	230	$14,781.36
1897-98	481	12,508.26	1904-5	564	25,943.54
1898-99	317	10,525.71	1905-6	571	34,388.80
1899-1900	567	28,265.51	1906-7	858	56,648.03
1900-1901	645	26,408.73	1907-8	563	35,620.47
1901-2	836	33,799.71		?	
1902-3	518	23,153.44	Total	...	328,003.98

During this time the levee line closing the Bougere crevasse opposite the Jackson lands had not been constructed, it being commenced in 1902 or 1903 and completed in 1910, and the levee system had not reached that state of completion which now exists, and claimants, with the aid of their private levees, now destroyed and washed away, and by replanting after overflow, were able to raise crops of the above value. By offsetting profits against losses from the cultivation of said land during the period from 1896 to 1907, inclusive, said lands were not profitably cultivated. Considering the number of acres of land cultivated by claimants and the amount realized from the sale of crops for said years, it cost about $25 per acre to plant, cultivate, and gather a crop of cotton.

XV.

Before the creation of the Mississippi River Commission by act of Congress, and the adoption of the Eads plan as aforesaid, the levee lines along the Mississippi River theretofore constructed by State and local authorities consisted of a broken chain of levees of insufficient height and strength to confine the flood waters, and had been built without regard to a uniform grade line. The United States then caused a survey and report to be made by its officers and agents showing the condition and location of levee lines theretofore constructed by State and local authorities as they then existed.
35 This survey suggested a proposed continuous system of levees from Cairo to the Head of the Passes. In many instances it was a blanket survey which encompassed and took in the lines of levees theretofore constructed by State and local authorities as above stated. The project recommended by the Mississippi River Commission adopting the Eads plan for the systematic improvement of the river from Cairo to the Head of the Passes was practically adopted by act of Congress approved March 3, 1881. The United States then undertook the projection and completion of a continuous line of

levees from Cairo to the Head of the Passes, as suggested by this survey and the Eads plan, and as recommended by the Mississippi River Commission, and, in furtherance of that plan and as part of and supplementary thereto, adopted to its use, and is now using, the levees theretofore constructed by State and local authorities, thereafter making them much larger and stronger. Since that time, levee construction, whether done by the United States or State and local authorities, has been in conformity with the grades and methods of construction adopted by the Mississippi River Commission, and the efficiency of the levee system has been largely due to this fact.

The extension of this levee system by the United States from Cape Girardeau, Mo., to the Head of the Passes was authorized by act of Congress in 1906. (34 Stats. L., p. 208.)

The construction of the levees made the high-water bed narrower and was followed by increased flood heights, which made it necessary to build the levees higher and stronger from time to time. The grade established by the Mississippi River Commission to which levees should be built was from 2 to 5 feet higher than the highest known water until June, 1910, when that grade was changed by the Mississippi River Commission *to* 3 to 5 feet above the highest known water, and since then the levees have been raised or constructed in accordance with that grade.

XVI.

In the upper Tensas district, beginning at Amos Bayou, about 17 miles north of Arkansas City, and thence down to the Louisiana line, the United States had practically constructed the entire system, closing the upper Tensas Basin, having built 3,098,606 cubic yards, against 304,014 by local authorities, and added 1,202,884, against 41,187 by local authorities.

The following table, compiled by the Mississippi River Commission, 1893, shows the yardage erected in said district:

	Cubic yards.
In levees in 1882	1,788,301
Built by the United States Government to June 30, 1892	3,098,606
Built by the Tensas Basin levee board, 1891-92	176,073
Built by Desha levee board, 1891-92	27,941
Built by Chicot levee board (estimated)	100,000
	5,190,924
Less levees abandoned 1888-92	642,000
Total yardage in levees in 1892	4,548,924
Levees built by United States Government to June 30, 1893	1,202,884
Levees built by Tensas levee board, 1893	41,187
Total	5,792,995
Less levees abandoned in 1893	150,000
Total yardage in levees in 1893	5,642,995

36 XVII.

The work of levee improvement continued and to June 30, 1910, the commission had allotted to levees $27,927,329.40.

The Bougere crevasse was closed and the levee line extended down to a point near the mouth of Red River.

The Bougere crevasse is opposite the claimants' lands, and the crevasse occurred during the flood of 1859. It remained entirely open until 1902 or 1903, when efforts to close it commenced, since when it has been practically closed by the United States and the local authorities extending the levee line downstream to a point near the mouth of the Red River.

This levee closing the Bougere crevasse is 29 miles in length and 23.4 feet in height, furnishing a continuous line of levee opposite the Jackson lands. It was completed June 28, 1910. Its effect in flood times is and will be to produce an increased flood stage of about 4 feet of water on the Jackson lands in addition to the increased elevation of 6 feet in the flood height.

The levee line immediately above and below the claimants' lands which resisted the flood waters of 1908 was constructed in part by the United States and in part by the local authorities.

The levee opposite claimants' land was constructed by United States authorities alone.

XVIII.

The effect of closing the natural outlets along said river and confining the flood waters between the improved levee system by the United States and the local authorities to improve the river for navigation and to reclaim and protect the lands along the Mississippi River, respectively, is to obstruct the natural high-water flow of the waters of said river in and along its natural bed along and in front of the lands of claimants, thereby raising the level of the water of said river to the extent that when there is now a flood tide the waters of said river more frequently, but, as before levee construction, accumulate, flow upon, and remain standing upon and over said land for a longer period than it did prior to said levee construction, so that the claimants are now interrupted in the profitable use, occupation, and enjoyment thereof during the seasonable months of the years of overflow, and as a result of said water being now held on said land for a longer period than it remained prior to said levee construction and prevented from immediately flowing off, as it was wont to do before said levee construction, part of the said land, about 1,700 acres, has now become covered with additional superinduced additions of sand and silt, rendering that part of said land unfit for profitable cultivation and destroying its market value.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that claimants are not entitled to recover judgment against the United States, and their petition is therefore dismissed.

37 *Opinion.*

BOOTH, J., delivered the opinion of the court:

The question now before the court arises on claimants' and defendants' motion to amend findings and for a new trial.

This is one of a class of cases involving an alleged taking of private land in the course of the improvement of the Mississippi River by the United States in aid of navigation. The original petition was filed in 1894 in which the ad damnum was stated at $107,257.50. Defendants' demurrer to this petition was overruled in 1896 (31 C. Cls., 319), since which time three supplemental petitions have been filed increasing the aggregate damages claimed to $569,702.50. The lands of claimants lie on the east bank of the Mississippi River, about 40 miles below Natchez, in Adams County, Miss., embracing a total of 4,265.05 acres, segregated by description into four plantations, as follows: Cerro Gordo, Black Hills, Alloway, and Wakefield. The petition alleges that prior to the year 1890 said plantations were comparatively high and so situated as to be exempt from the overflow waters of the Mississippi River except at long intervals, and that the occurrence of such overflows did not materially affect their productive capacity or their value; that about 1883 the officers and agents of the United States, in pursuance of an act of Congress creating the Mississippi River Commission, and by subsequent acts passed to aid in the improvement of the navigation of said stream, have projected and constructed, and are now constructing a system of public works, consisting of levees and embankments, for the purpose of confining the flood waters of said river between the lines of said levees and embankments, thereby securing an increased elevation and force to the current of said river in order to scour and deepen the channel; that in the prosecution of said work by the officers of the commission, they have adopted and made use of the various State systems of public levees and private levees constructed for the reclamation of overflowed lands lying alongside the river wherever the same are available; that on the east side of said river from Vicksburg to Baton Rouge no levees have been constructed, the officers of the commission availing themselves of the highlands skirting the same and have adopted the lands between the levees on the west and the foothills on the east as the channel of the river, and the lands here claimed for lie therein. The petition concludes with a general averment that as a result of the adoption of the Eads plan, involving the reclamation of the flood waters of the river by the erection of levees and embankments and detouring same into its channel, it has thereby increased its flood heights to such an extent as to annually inundate the premises of the claimants, destroying their value as agricultural lands, and leaving thereon a deposit of silt and sand of such proportions as to force their abandonment.

Claimants' contention rests entirely upon the assertion of a right under the fifth amendment to the Constitution of the United States to compensation for private property appropriated by the United States for governmental purposes. The defendants interpose two

defenses. First, that the damages accruing were consequential in character, and second, that the public works complained of were constructed by the cooperation of the United States and the various local authorities, with no means at hand to ascertain the extent of their respective liabilities.

38 The distinction between consequential damages occasioned riparian owners by the construction of governmental public works in navigable streams, and a taking of private property in furtherance of the same, is most generally a difficult and nice question of law. The rule is well settled that where officers of the United States appropriate to a public purpose the private property of another, admitting it to be such, an implied obligation arises to pay for the same. (South Carolina v. Georgia, 93 U. S., 4; United States v. Great Falls Manufacturing Co., 112 U. S., 645; United States v. Lynah, 188 U. S., 445.)

In Pumpelly v. Green Bay Company (13 Wall., 166) the Supreme Court overruled a contention that a taking of private property within the meaning of the fifth amendment to the Constitution was limited to the identical lands physically taken, and extended the liability in such cases to other lands actually invaded by "superinduced additions of water, earth, sand, or other material * * * so as to effectually destroy or impair its usefulness." In the Pumpelly case the lands involved were totally submerged by overflow waters and had been so since the completion of the public works and for at least six years subsequent thereto; they were adjacent to the impediment placed by the defendants across the stream and were so situated that the result of the improvement was to retard the natural flow of the water and accumulate such a volume of same at the situs of the works as to back up the overflow upon and over the plaintiff's lands. It in effect amounted to a physical invasion and a practical ouster of the plaintiff's possession. To the same effect are United States v. Great Falls Mfg. Co. (112 U. S., 645); United States v. Lynah (188 U. S. 445); United States v. Williams (188 Ib., 485).

In the Lynah case, supra, a case especially relied upon by the claimants, the findings show, and from the opinion it is clearly deducible, that it is not a departure from the previous rulings of the court upon this subject. Mr. Justice Brewer, in speaking for the court says: "It is clear from these findings that what was a valuable rice plantation has been permanently flooded, wholly destroyed in value, and turned into an irreclamable bog; and this as the necessary result of the work which the Government has undertaken." While there was dissension as to the full import of the findings, there was no dispute as to the rule of law. Again it is observable that in the Lynah case the improvements complained of were placed in the bed of the river having the same disastrous effects as in the Pumpelly case.

In United States v. Welch (217 U. S., 333) and United States v. Grizzard (219 U. S., 180) the Supreme Court extended the quantum of compensation recoverable for an actual physical taking of private property under the fifth amendment so as to embrace not only the market value of the lands actually taken, but to the remainder af-

fected by such invasion, including the right of access to a public road destroyed by permanent flooding.

While what constitutes an actual taking is difficult of ascertainment, it is clear from the opinions that to constitute an actual taking there must be an actual invasion of the lands amounting to a practical ouster of claimant's possession, an actual overflow of such a permanent character as to imply an intent to take, and a correlative obligation to pay for the lands so taken. Peabody v. N. S.
39 (43 C. Cls., 5). The Supreme Court has said that "the acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the constitutional provision." In Transportation Company v. Chicago (99 U. S., 635)—from which the above quotation is taken—the court held the municipality exempt from liability for damages unavoidably caused an adjoining property owner by obstructing a street and a portion of the river in the course of constructing a tunnel under the Chicago River.

Numerous decisions covering the entire scope of consequential injuries as distinguished from the taking under the fifth amendment of the Constitution, are discussed and cited in the case of Heyward v. United States (46 C. Cls., 484); it is unnecessary to again discuss them here.

In Bedford v. United States (192 U. S., 225)—a case of extreme significance to the issue here raised—the Supreme Court in distinguishing the difference between consequential damages and a taking of private lands for public purposes, declined to attach responsibility to the Government for constructing certain improvements in the Mississippi River in such a way as to result in a complete and permanent submerging of certain portions of the claimant's lands. The findings of the court in the Bedford case disclose the following situation: Prior to 1876 the channel of the Mississippi River was around a narrow neck of land known as De Soto Point; in the spring of that year De Soto Point, yielding to constant erosion and the force of the current of the river, became so narrow that the river broke through, thereby detouring the main channel from in front of the city of Vicksburg to a distance some miles away in a southerly direction. The effect of this complete change in the channel of the river was to force the water with great velocity against the Mississippi bank at what is known as the cut-off of 1876. The United States in 1878 and subsequent years, in pursuance of acts of Congress, erected along the new banks of the river near the cut-off some 10,700 feet of revetments, the purpose being to prevent further erosion of the banks of the new-made channel, which, if continued, would necessarily carry the main channel of the river farther away from the city of Vicksburg. In the consummation of this purpose and because of the revetment work the waters of the river were deflected toward the land of the claimant, situated some 6 miles below the same, and subsequently permanently submerged them. In answering the plaintiff's contention, the opinion uses the following language:

"The contention asserts a right in a riparian proprietor to the unrestrained operation of natural causes, and that works of the Government which resist or disturb those causes, if injury result to riparian owners, have the effect of taking private property for public uses within the meaning of the fifth amendment of the Constitution of the United States. The consequences of the contention immediately challenge its soundness. What is its limit? Is only the Government so restrained? Why not as well riparian proprietors; are they also forbidden to resist natural causes, whatever devastation by floods or erosion threaten their property? Why, for instance, would not, under the principle asserted, the appellants have had a cause of action against the owner of the land at the cut-off if he had constructed the revetment? And if the Government is responsible to one landowner below the works, why not to all landowners? The principle contended for seems necessarily wrong. Asserting the rights of riparian property it might make that property valueless. Conceding the power of the Government over navigable rivers, it would make that power impossible of exercise, or would prevent its exercise by the dread of an immeasurable responsibility."

We have given at length and in great detail the substantially agreed upon findings respecting the hydraulics of the Mississippi River. The evidence upon which they are predicated consists of the numerous reports of the Mississippi River Commission and various other reports of the authorized officers of the Government in the course of said work. From said findings it is apparent that said stream from Cairo, Ill., to the Gulf of Mexico is one of great sinuosity; its innumerable bends with scarcely a single line of direct current have made it susceptible to great overflows in times of anything like abnormal conditions. In fact, overflows are so frequent, and the use of riparian lands for agricultural purposes so precarious, that it is indispensable to protect them by lines of levees and embankments. The alluvial valley of the river extending from Girardeau, Mo., to the Gulf of Mexico has been divided into six large basins (four on the west bank and two on the east); through the medium of these large and extensive formations the flood waters of the stream have from time immemorial been discharged, passing consecutively from one to the other until they reach the Gulf. Within the limits of the respective basins are millions of acres of alluvial lands which have been at least partially reclaimed by the construction of private levees or their inclusion in local levee districts formed under local laws. These vast drainage basins in their natural state have in themselves been of inestimable value to the riparian owners of lands not situated therein, for the flood waters of the river escaping through them rapidly absorbed the surplus waters suddenly projected upon the higher lands and saved them from extreme injury.

The lands here involved are situated at the southeastern limits of the Lower Tensas Basin opposite what is known as the Bougere Crevasse. They are not protected or reclaimed by levees and lie in that extensive zone some 253 miles in length extending from near Vicksburg, Miss., to Baton Rouge, La., on the east side of the river

where the Government has not seen fit to construct any levees or embankments or any other improvements to aid in the navigation of the river, the nearest Government levee to claimants' land being on the opposite side of the river in the State of Louisiana and the nearest Government levees on the east bank, one being 157 miles north and one 96 miles south in the State of Mississippi. They are alluvial lands situated within the Delta of the river, and have been and of necessity must have been subject more or less to the overflow waters of the river. It is conceded that there is nothing peculiar in their location and that they have always been subject to overflow in times of high water. They lie, it is true, between the banks of the river on the west and the so-called highlands or foothills of the river on the east. The Bougere Crevasse occurred during the flood of 1859, and until it was subsequently closed served in part at least as a
41 channel through which the flood waters upon claimants' lands were speedily reduced.

The United States in the creation of the Mississippi River Commission and the numerous appropriations granted to forward the work, contemplated a most comprehensive scheme involving the reclamation of the flood waters of the river, and by a system of levees and embankments erected upon the banks of either side of the same to prevent its overflow, confine this enormous volume of water in the main channel of the river, thereby securing an increased velocity to the current, which would eventually deepen the channel. The mere assertion is sufficient demonstration that as a result of this project the flood heights of the river would be materially increased, for it is quite apparent that the enormous volume of water previously escaping through these immense basins having been deflected into the main channel of the river would result in causing lands unprotected by levees or embankments to be subject to more frequent and indeed more serious inundations. In the prosecution of this general plan the United States have made use of and are now using the levees available for the purpose which were constructed by private owners of land or by State and local drainage districts. They have also connected this necessarily disjointed system of levee improvement by constructing new levees and embankments where none heretofore existed, until at present they have substantially a continuous line of levees on the west bank of the river from some distance south of Cairo, Ill., to the Gulf of Mexico, and at such points on the east side as in the judgment of the engineer officers of the Army serve the purposes of the improvements.

The findings show, and it is conceded, that as a result of the system employed by the United States, in connection with the State and local authorities, the lands of the claimants have been and are now more frequently overflowed than before the construction of the levees. It is indisputable that a large portion of claimants' plantations have been practically destroyed for agricultural purposes by additional superinduced deposits of silt and sand of sufficient depth to render some portions of them valueless. It is not questioned that the claimants involved have suffered great loss in their inability to

annually harvest crops or cultivate to maturity the products usually raised upon said lands.

One contention of the claimants extremely vital to the case, set forth in the petition and emphasized in the briefs, fails for want of proof. It is this, that the Mississippi River Commission has adopted as the main channel of the river from Vicksburg to Baton Rouge the lands between the levees on the west and the highlands on the east, and for this reason have not constructed any levees or embankments on the east side of the river. To sustain this contention the court must indulge an inference from the general plan of the public works. There is an utter absence of any such express intent found in the numerous reports of the commission. The officers of the commission have upon numerous occasions in their reports urged upon Congress some equitable legislative relief for the numerous sufferers in this particular locality, and have described in detail their unfortunate situation and predicament, but we have been unable to find (and certainly can not conjecture) that it was part of the
42 general plan of improvement to appropriate as the channel of the river this most extensive area of private lands extending along the river bank to a total length of some four or five hundred miles, increasing the width of the channel in some instances more than a mile. The damages would indeed be immeasurable and the court could not sustain the judgment asked for in the absence of strong and convincing proofs. The testimony to sustain such contention, if it could be sustained, is easily accessible from living witnesses, and so clearly subject to positive proof that inferences and implications from other testimony in the record are unwarrantable. It would indeed be an anomalous proceeding to predicate a judgment for hundreds of thousands of dollars upon an ex parte report found in official reports to Congress of the Mississippi River Commission. The discussion of this subject unanimously approved in the first opinion of the court was sufficient warning to claimants that the court was unwilling to rest this particular contention upon the evidence introduced to sustain it. The intentional taking of a vast acreage of lands is a transaction quite too solemn to depend for adjudication upon indistinct and recommendatory reports, when the transaction itself is so clearly susceptible to positive proof.

The Bedford case establishes that the United States, in the exercise of its plenary power and authority over the navigable streams of the country in aid of commerce and navigation, can by public works resting only against the banks of the channel prevent the same from erosion and preserve its natural identity; that consequences, however injurious, resulting from such procedure are but natural results, consequential in character, and damnum absque injuria. The improvement of the Mississippi River through the instrumentality of a congressional commission manifestly purposed not only the reclamation of the extensive flood waters of the stream, but the erection of such permanent structures along its banks as would prevent the same from erosion and successfully resist the increased velocity of the current and the increased flood heights of the river. The Gov-

ernment was not concerned in the reclamation of riparian lands and was without authority to expend money for the purpose. (Act Mar. 3, 1881; 21 Stat., 468-474.) It was alone concerned in an endeavor to establish settled conditions, throw the escaping flood waters back into their natural channel, and keep them there. It undertook to preserve the channel of the river, the channel the river itself had made in its meanderings from its source to its mouth.

The claimants' lands, unfortunately situated as were the lands of Bedford, suffered from this improvement in that they were more frequently overflowed than theretofore, and the resultant deposits were more extensive.

The findings show, and it is conceded, that said lands are not and never have been permanently submerged; that in the years 1894-1896, 1900-1902, 1905, and 1910 they were not overflowed at all; that despite partial overflows from 1896 to 1908 the claimants have harvested and sold $328,003.98 worth of cotton therefrom; that as late as the season of 1909 claimant E. H. Jackson had 500 acres in cultivation, and claimant Mattie W. Jackson in 1910 was enabled to realize profit from her plantations which were not overflowed. Aside from the question of permanent submerging, even if same
43 prevailed, the claimants under the authorities cited could not recover. The United States was clearly within the scope of its authority in preserving the banks of the river; and if thereby the perpetual continuance of the great basins of drainage made by the overflow waters of the river which had served as natural outlets for the same were destroyed, it was but the incidental result of the prosecution of the work, and the United States is not to be held liable in damages for pursuing its general plan of improvements alongside the established channel of the river whereby it prevents the water which should be in the channel from escaping elsewhere.

This case is not like the case of Barden v. City of Portage (79 Wis., 126); no artificial structures were placed on or near the claimants' lands; no waters were deflected toward the same; the public works complained of simply destroyed their existing means of drainage made by the uncertain flow and course of an exceedingly crooked and unreliable water course. Prior to 1859 claimants had no outlet through the Bougere Crevasse. There was no absolute certainty that it would continue to be a means of drainage for the lands, for an unusual flood height, a sudden change in the elevations of the basins, or the making of a new channel by the river itself might have destroyed its usefulness and thereby subjected claimants to injuries as extensive as here claimed for. The United States closed the crevassee by the construction of levees on the banks of the river and the flood waters theretofore escaping through this channel were retarded and remained longer on the claimants' lands, just as in the Bedford case the United States held intact the new-made channel of the river and thereby submerged 2,300 acres of the plaintiff's lands which would have remained high and dry if the water had continued in its old channel. The fact that claimants' lands were not so frequently subject to overflow under the natural conditions that existed prior to the construction of the levees does not obligate the

Government, in the lawful prosecution of public works in aid of navigation and commerce, to avoid a disturbance of those natural conditions or otherwise incur extensive liabilities.

The facts in the case of Archer v. United States, No. 30471, decided December 4, 1911, are so entirely different from the facts in this case the decision of the court in that case can not apply here. In the Archer case the findings show that the officers of the United States, to protect the channel of the Mississippi River, actually invaded and took possession of more than 31 acres of the lands of Archer and constructed thereon a spur dike, made out of his own soil, some 66 feet in length. The result was to deflect the current of the river over and across the lands of the claimant, in consequence of which they were rendered valueless. The Archer case is similar in most respects to Pumpelly v. Green Bay Co., supra, and Lynah v. United States, supra.

The great basins of the Mississippi reclaimed the lands of riparian owners on the opposite sides of the river from where they were formed and forced those within their limits to erect levees and embankments or abandon their farms for cultivation. The public works of the United States in the aid of navigation incidentally closed these immense outlets, not in this case by a physical invasion of claimants' property, not by appropriating any portion of
44 their soil for levees, nor by proceedings in eminent domain, but by a system of levees built and adopted where previously built on the banks of the river to prevent the water from getting out of the channel and becoming so low as to impede and retard navigation. The bed of the stream was not disturbed; no dams or cross-tide dams, jetties, or other improvements retarded the flow of the water and backed it up and upon claimants' lands. The United States simply took the banks of the river as they found them and sought to preserve them in statu quo. The condition now is what it would have been had the overflows been restrained long years ago. The character of the work done was not essentially different from dredging; without doubt the governmental authorities had full power and authority to deepen the channel by dredging, and if they adopted a different means better suited and perhaps more inexpensive, which in effect accomplished the same purpose, the results are the same. Surely it could not be said from the adjudicated cases that the United States is disabled from increasing and preserving from erosion the banks of a navigable stream and thus forestalling by an important improvement the continuance of a condition which if allowed to continue would eventually destroy the usefulness of the river as a commercial highway without incurring, as was said by the court in the Bedford case, "immeasurable responsibility." Claimants' lands from their natural state were burdened with the servitude of a dominent right in the Government of the United States to improve the river in aid of navigation and commerce.

The Mississippi River Commission, in its annual report for 1894 at page 2713, reviews at length the subject of injuries to private lands situated in the alluvial basins of the river. The whole tenor

of their observations indicate an apparent indecisiveness as to the extent of responsibility attaching to the United States and the State and local authorities. In speaking of the erection of private levees by the owners of riparian lands in this particular locality, whereby the same could be reclaimed and protected, the commission uses this language:

"It must be recognized that the result will be to inflict some and perhaps great hardships upon the owners of lands in the unprotected areas described. Just how great the increase of burden cast upon those lands from this cause will be can not now be foreseen. They have always been liable to overflow by the highest floods, and they have always escaped overflow in some years. It is probable that this will continue to be true in the future as in the past. There may be, however, some floods which, unconfined, would not overflow them, but which, confined, will overflow them, and the injury in such case would doubtless be of that immediate and proximate character which constitutes recognized ground of legal redress.

"But the subject is one with which the commission does not feel authorized to deal. In making recommendations for the expenditures of money in the construction of levees it has felt bound to make such application of it as would probably secure the largest aggregate of beneficial results. Some of the minor areas mentioned are large and valuable enough to warrant the expenditure of the money necessary to protect them by levees, while others are not. As to the former, the work is at present simply deferred to await the completion of other work which is considered more important. As to the latter, the construction of levees by the United States would seem to be an expenditure of money merely or mainly for the purpose of repairing a private wrong. This the commission regards as beyond its jurisdiction."

From the report it would seem that it is not impossible for claimants to protect their lands from overflow by private levees and embankments, and Finding XXXIX shows that it had been done. If so, the duty is cast upon them and the damages claimed thereby materially minimized, if not fully prevented. (Manigault v. Springs, 199 U. S., 473-483.)

It is difficult to see from the record in this case wherein the improvements constructed by the United States on the banks of the Mississippi have resulted in such an invasion of claimants' lands as to amount to a practical ouster of possession. True, they are not in all respects as they were previous to the improvements, and doubtless their cultivation and value have been impaired. No doubt when they were purchased by the present owners a change in the situation as it then existed was not contemplated, but the ownership of riparian lands on navigable waters is always subject to the consequences of governmental improvement of the stream in aid of navigation. (Gibson v. United States, 166 U. S., 269.)

An argument sustained only by a contrasting of facts in this case with those found in the Bedford case is more than minimized by the fundamental rule of law established by the Supreme Court in the Bedford case. The Bedford case sustains the contention that the

power of the United States in making public improvements in aid of navigation and commerce is not limited to a maintenance of natural conditions. If it was, improvements would be valueless and vast appropriations wasted. In this case the Bougere Crevasse, which is in fact the crux of the whole situation, is, as its name implies, a breach in the banks of the river made by the flow of the stream itself. If the Government is powerless under the law to close this breach either by revetment or levee and maintain the integrity of the river banks, then it is difficult to see how efficient public works could possibly accomplish their designed purposes. The Government has the undoubted right to maintain the stream in its natural condition—i. e., as it would naturally be if these extensive crevasses had never occurred. However advantageous natural crevasses may be for drainage purposes to riparian owners, nevertheless they may be closed by the United States in improving the navigation of a stream in aid of commerce, and if nothing more is done the resulting damages are consequential.

The rulings of the Supreme Court in the Bedford case alone preclude a judgment for the claimants, and the petition is dismissed. It is so ordered.

46 MATTIE W. JACKSON, Widow; WILLIAM GRAHAM JACKSON AND GLADYS L. JACKSON, Infants; AND ERNEST H. JACKSON

v.

THE UNITED STATES.

HOWRY, *Judge*, dissenting:

The cause of action arises out of the authorized acts of certain officers and agents of the defendants in so improving the channel of the Mississippi River as to take the certain lands described in the petition of the plaintiffs for public purposes and use. The importance of a right determination of the issues can not well be overestimated.

In so far as plaintiffs are concerned, a result adverse to the right to recover can neither be depreciated nor underrated, because when it shall be determined, if at all, that their land has not been appropriated for public use, and consequently has not been taken within the meaning of the fifth amendment to the Constitution, then these plaintiffs will be effectually deprived of rights of property so valuable to them as to have accomplished their ruin.

The private right involved, important as the result must be to that right, can not be compared, however, to those larger questions disclosed on the face of the record as to whether the acts of the Government affecting these lands and other lands similarly situated amount to a taking of property for which compensation should be made or whether these acts resolve themselves into a question of consequential injury only for which damages can not lawfully be awarded.

The findings establish that the lands for whose taking compensation is asked are located within the limits of a narrow strip of

country in the Homochitto Basin, on the left bank of the river, 40 miles below Natchez, Miss., and 25 miles above the mouth of Red River, and between the Mississippi River and the highlands east of it between Vicksburg and Baton Rouge. This basin has an average width of 2 miles. The bluff behind the lands is known as the foothills and is being used as the only obstruction to flood waters, and serves the purpose of levees, leaving the flood invasion the lands fronting the river in the basin. The reason of the Government for refusing to build levees on the basin banks of the river grew out of the fact that the cost of building levees within that basin
47 was greater than the value of the lands which such levees would protect. The frontage of the lands along the river in that basin is so short that the back water of floods entering through the opening left at the lower end for local drainage of the basin will reach to the inner foot of the levee and submerge nearly, if not all, of the inclosed land. The complete reclamation of the lands in this basin is only practicable by treating them as polders and establishing an artificial drainage by pumps and flood gates. The surveys of the Government confirm and prove that the cost of the levees "in most cases" would exceed the value of the land. The foothills back of this basin were near enough to serve the purposes of a levee line in times of high water. For these reasons the Government did not construct any levees in that district known as the basin.

The Mississippi River Commission suggested three ways of dealing with the problem of protecting these lands or compelling the owners to abandon them, to wit: (1) To aid the owners of the inundated lands in building levees; (2) To compensate the owners in damages for their injuries; and (3) To buy the lands and devote them to forestry.

The lands in suit have been subject to overflow since 1828 from the river. In periods of overflow a deposit of silt and sand has been precipitated during seasons of high water, but the water quickly passed off. The private levee on the Jackson lands saved the property from overflow in 1899 and 1904. The overflow of the lands caused by the progress of the Government work brought heavier deposits to the land and the effect of the frequent and successive overflows beginning in the year 1906 and extending through 1909 was to drive away the tenants, cover 1,700 acres with sand and silt deposits from 6 inches to 6 feet in depth; to cause the land to grow up with weeds, young willows, and cottonwood from 6 to 15 feet in height; and to lift from their foundations and wash into the fields many of the buildings, houses, and cabins formerly on the lands, and to carry away the flooring from these houses and fencing on the land through the action of the swift currents of the water so that the lands have been destroyed for agricultural purposes and have no market value.

The work of levee improvement continued to June 30, 1910. The Mississippi River Commission up to that time had allotted to levees nearly $28,000,000. The commission had closed what is known as the Bougere crevasse, opposite the lands named in this case. That

crevasse had remained open from 1859 until 1902 or 1903, since when it has been practically closed to a point near the mouth of Red River by the improvements on that side of the river, the effect of which has been to throw the water back onto the lands described by the petition in this case. The levee closing the crevasse was 29 miles in length and 23 feet in height, furnishing a continuous line of levee opposite the Jackson lands. The effect of the closure in times of flood is to produce an increase flood stage of about 4 feet of water on the Jackson lands in addition to the increased elevation of 6 feet in the flood height. The levee opposite the lands here named was constructed by authority alone of the United States.

By closing the natural outlets along the river the overflows from the waters of the Mississippi occurred at such frequent intervals and remained for such a long duration of time, the land has become useless because of the heavy deposits of sand.

48 Before the Government undertook improvements on the west bank of the Mississippi River opposite the land of these plaintiffs, levees sufficiently high and strong to hold the flood waters in the channel of the river had never been built. Consequently, in periods of overflow the water remained for a short time only on the Jackson land, escaping through "the natural outlets and crevasses into the basins and from said basins into the Gulf of Mexico." The outlets and drains provided by nature were such as to accommodate the flood waters and the lands of these plaintiffs were not overflowed as frequently before the outlets were closed by the levee construction of the United States "and consequently were but little injured by the overflows."

But the effect of the adoption of the foothill levee line was to keep the lands between the new levee line and the river submerged too long to enable the owners to cultivate the land.

The plan of the United States was to increase the velocity and scouring power of the water and to deepen the channel of the Mississippi River for two purposes: (1) To improve the river for navigation, and (2) reclaim and to protect the land on the west from overflow in times of high water.

Thus to reclaim and protect the land on the west bank of the Mississippi the Government has dispossessed plaintiffs from their lands on the east bank.

The issues are strictly issues of law and can not properly be determined without keeping closely in view the findings and their effect upon the rights of the parties.

The findings import verity. They must be accepted as true in obedience to the rule of the Supreme Court, from which there can be no departure without abrogating the rule itself. The appellate court will refuse to look elsewhere for the facts except as they appear in the findings and official reports of which judicial notice will be taken and not in the opinion of my brethren of the majority.

The majority here is of opinion that the Mississippi River Commission has not adopted as the main channel of the river from Vicksburg to Baton Rouge the lands between the levees on the west and the highlands on the east, because of "an utter absence of any

such express intent found in the numerous reports of the commission"; and it is suggested in the principal opinion that the adoption of the line suggested should be proven "from living witnesses" because "the intentional taking of a vast acreage of land is a transaction too solemn to depend for adjudication upon indistinct and recommendatory reports when the transaction itself is so clearly susceptible to positive proof."

The "intent" is not in issue, and what the Mississippi River Commission "intended" is not material. What the commission did and the effect of what it did is material. If the intention of an official body be material enough to be made an issue living witnesses could not be heard to prove the intention except by stating what others did, not what they thought.

The material thing, then, to be considered is what the findings show on this point, though it does not seem to me to be very material to state anything about it in view of the fact that it appears from the comments of the majority of the court that the Mississippi River

49 Commission did officially report as the main channel of the river the lands between the levees on the west and the highlands on the east. If this is not the "adoption" of a plan it is nothing. It was the adoption of plan enough to destroy the lands of these plaintiffs.

As the findings are agreed to by the plaintiffs and the Attorney General, the matter of the "adoption" of the foothills as the permanent levee line of the river is the only subject matter of difference between the parties on the facts. The "adoption" being something in the nature of a conclusion, the specific findings must settle any differences on this matter if it be of any importance.

Finding XI shows that the extension of the general levee system since the United States adopted its use and assumed "permanent control" of the levees has resulted in an increased elevation of general flood levels, thereby subjecting plaintiffs' land to deeper overflow than they were subjected to formerly or would be subjected to now if the levee system was not in existence and consequently has destroyed the value of the lands for agricultural purposes caused by the abandonment since 1908. Taking the findings altogether and with knowledge of the fact that the old and broken pieces of levees were taken by the Government and connected together and new levees built and the new and the old works were strengthened and that the works are now in that condition, it may fairly be stated that the line suggested and in actual use has been adopted by the Government.

The case does not involve any question of immeasurable responsibility either in law or in fact, because: (1) The Government of the United States does not undertake public work beyond its resources. (2) There is nothing in proof to indicate or to justify the court in inferring that the pecuniary responsibility of the Government is without its present ability to pay. (3) Immeasurable responsibility arises for remote and consequential damage and where the consequences of improving navigation in the interest of commerce between the States are of such overwhelming character as restrains the

Government from undertaking public work so momentous as to make impossible the exercise of the right to improve. That is not this case. The matter before the court is unlike any class of cases (or, for that matter, unlike any one case) where it appeared that the object of the work was merely to preserve the conditions created by natural causes. (4) Though the property is no longer valuable to the owners because it can not be used for agricultural or grazing purposes, nevertheless the lands are capable of growing many kinds of valuable timber and can be made to produce material for revetments and other work necessary to improve the natural channel of the river.

While the market value of the lands has been destroyed and they are no longer useful to the owners or to anyone at the present time, they have yet a prospective and speculative value in that the future may prove the property of considerable value to the United States. This prospective value, it is true, is in the indefinite future and necessarily depends upon the growth of timber. When the conditions as to value are met as the consequence of the timber growth the Government as the rightful owner will have to its credit something for what it ought now to pay. But if it be speculation merely as to whether in time the lands will become valuable the reason is not diminished for extending compensation for a taking that may be everlasting, and for which taking the present owners are without remedy except as provided by law.

50 As a matter of common knowledge, appearing from the public records and from the files of this court and estimates probably appearing in the official reports of the Mississippi River Commission, there are plantations destroyed by the character of the improvements of the Government exceeding but little over 100 farms and the whole body of land thus taken being not worth probably over $7,000,000. From the sources of the great river to its mouth similar conditions do not exist (and probably never will exist) elsewhere.

Federal power over commerce among the several States is broad enough to enable the legislature to carry out one of the great objects of our Union. This was long ago settled in Gibbons v. Ogden, 6 Wheat., 204, and was accompanied with the statement that this power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the Constitution."

But the Supreme Court never meant to say, nor did it imply, that the power to improve may be exercised to such an extent that public work may be undertaken and carried on without compensation to the citizen owner where his property has been taken for the benefit of the public. The exercise of the power to the "utmost extent" is accompanied by, and goes hand in hand with, the fifth amendment, which prescribes limitations on the power to improve navigation unless means enough are used to pay such owner when public exigencies dispossess him of his property.

When it shall be held by courts that the Government can constitutionally spend millions in carrying water to lands otherwise

arid. and when it shall further be held that the appropriation of the lands of one person may be made by the United States in the name of and for the improvement of a river and which incidentally includes protection to the lands of a person on one side of that river without compensation which can not be provided for a landowner on the other side who becomes ousted and merely because of the dread of large responsibility it will be time enough to say, in the language of an illustrious Englishman, that when courts can be influenced by considerations of mere cost regardless of the protection provided by the organic law for those in the enjoyment of private property, such country is hastening to decay.

Congress adopted the Eads plan, which provided for a continuous line of levee construction from Cairo to the Gulf. Permanent control of the low, insufficient, and disconnected levees which had been begun by local authorities, and in some cases constructed by private land owners, was assumed by the Federal authority. Our tenth finding shows that the general improvement attempted to confine the waters in a narrower channel as the result of the increased elevation of the works on the banks of the big stream. This increased elevation produced more frequent and destructive overflows at all points where the levees were not strong enough to resist the force of the water.

Our twelfth finding shows the active closing of crevasses from year to year; and our thirteenth finding, taken in conjunction with the ninth, shows that before the joinder of the levee line by the United States (pursuant to the Eads plan) and which made the higher banks as they were constructed continuous, there were occasional overflows of plaintiffs' lands, but not enough to pre-
51 vent cultivation. The occasional deluges did not materially damage the lands for grazing and agricultural purposes nor affect their market value. On the contrary, the water (before the final public improvements) which flowed from above—not so much from love of motion as from want of rest—did not remain long enough to submerge the lands so as to prevent the planting of crops. The silt deposits enriched those lands where the water had quick opportunity to escape to a lower level. After the completion of the levee system by the construction of the higher embankments and the general confinement of the flood discharges within a narrower chanel the floods were so frequent as to make the unprotected land continue in a submerged condition too long to make the injury immaterial. These frequent and deeper overflows for a longer period of time had the effect of dispossessing the owners. If this condition did not constitute an actual invasion it is difficult to find a definition of what such conditions did create.

Official reports (Miss. Riv. Com. Rep., 1910, p. 2938) show "perpetual inundation"; want of redress for the sake of improvements to lands behind the levees on the opposite side of the river. The closing of the Bougere crevasse immediately opposite plaintiffs' lands finished the work of destruction and accomplished their ruin.

The majority of the court do not say, but assume from some report that "it would seem," that it was not impossible for plaintiffs to have protected their lands from overflow by private levees

and embankments, and if so the duty was cast upon them so to do, and if done the damages claimed would be materially minimized, if not fully prevented, citing Manigault v. Springs, 199 U. S., 473.

The sixth finding of the court (adverted to in the principal opinion) does not sustain the assumption. Overflows were in part averted by the private levee of plaintiffs at times. But the findings also show that when the crevasses opposite plaintiffs' lands were closed and the work of public improvement was continued to the extent of piling up more earth on the opposite side of the river in the construction of levees and to such an extent as to raise the level of the water in the river as much as 6 feet, private levees were washed away as the result of the public improvements. The owners could no more protect themselves without the sacrifice of the lands to the full extent of their value than could the United States. We have the official report disclosing that it was cheaper to the United States for the owners to abandon the lands and be compensated by the Government than for the United States to build levees. Especially is this report to be taken as true when, as the result of Government work, the findings show that the private levees had been washed away. If it was more profitable for the Government to pay for these lands than to build levees to protect them it necessarily follows that their market value was totally destroyed by the improvements.

Private levees could not have been reconstructed to prevent the floods by plaintiffs in the case before the court for the obvious reason that such levees as plaintiffs had ever put on the property were next to the river on lands owned solely by the plaintiffs. They were without power to build levees above their own lands for want of ownership.

52 The case of Manigault v. Springs, supra, merely decides that when an owner is put to additional expense in warding off the consequences of an overflow there can be no recovery; but where there is a practical destruction, or material impairment of value of lands by overflowing them as the result of the construction of dams, there is a taking which demands compensation. No amount of expenditure would have availed these plaintiffs to have saved their lands.

The question resolves itself into the difference between consequential damages and a taking of private property for public purposes. Only three cases are cited in the majority opinion which seem to have any bearing upon this one issue in the case.

In Transportation Co. v. Chicago, 99 U. S., 635, there appeared to be an impairment of the use where the acts done did not directly encroach upon property of a private nature. But Findings VI, XI, and XVIII in the present case establish encroachment upon the lands of such character as to destroy. The superinduced additions of water, sand, and silt proved to be permanent deposits to the extent of burying the lands in mud and annihilating value as to compel abandonment of the property.

In Gibson v. United States, 166 U. S., 269, it appeared that

there was no taking, no destruction, and no consequence except damage arising out of alleged inability to use a landing for the shipment of products from, and supplies to, a farm for the greater part of the gardening season. There was no water thrown back on the land. The Government neither attempted nor assumed to take private property. Subsequently, in United States v. Welch, 217 U. S., 333, an award was sustained for destruction of a right of way and also for damages to property destroyed for public purposes. Such "destruction for public purposes may as well be a taking as would be an appropriation for the same end," so the court said.

In Bedford v. United States, 192 U. S., 217, damages were claimed as the result of "revetments to prevent erosion of the banks from natural causes." But revetments did not change the natural course of the river. Said the learned judge, who delivered the opinion of the Supreme Court in the Bedford case, "There was no other interference with natural causes." The damage to the land, if any damages could have been assigned to the works at all, was but "incidental consequences" of something which the Government had the right to do.

If on the side of the revetments and above on the banks a levee had been erected there would have been obstruction of the flow of the water. The revetments shown to have been constructed in the case of Bedford were placed below high-water mark. The purpose of revetment is to prevent erosion by the waters to high-water mark but not above. The purpose of a levee is to obstruct the flow of water, which in many cases either increases or causes erosion. The purpose in the present case in the construction of a levee was (and its effect was) to obstruct the flow of water when it should get above the high-water mark and not below that mark. Revetment work is entirely submerged when there is enough water in a river to reach a levee placed on top of the bank. The objects of revetment work and a levee are entirely different and serve distinct purposes.

53 The seventh finding in the case of Bedford discloses that "the revetment did not change the course of the river as it then existed, but operated to keep the course of the river, at that point, as it then was, * * * and the injury done to the claimant's land was the effect of natural causes." In the case at bar natural causes had never occasioned injury to plaintiffs' lands and injuries would never have been occasioned but for an interference with natural conditions.

From 1828 to the time when the Government by its works threw upon plaintiffs' lands volumes of water and destroyed the attribute of ownership plaintiffs were able to cultivate their lands. Since then periodical overflows have been precipitated so as to deprive them of the use. The findings establish the permanent character of the taking and bring the present case within that of Pumpelly v. Green Bay Co., 13 Wall., 166, and that of United States v. Lynah, 188 U. S., 459. In the latter case the works were constructed in the bed of the river and obstructed the natural flow of its water,

and as a direct consequence caused the overflow of Lynah's plantation. That is precisely the condition in the case now before the court, except that instead of the works being placed in the bed of the river they were placed on the banks of the river, and the consequence of the one is as direct in the case at bar as the consequence was in Lynah's case. The case of Williams v. United States, 188 ib., 485, following Lynah's case, shows a similar taking. The just compensation provided by the Constitution for such taking and guaranteed obviously "requires that the recompense to the owner for the loss caused to him by the taking of a part of a parcel or single tract of land shall be measured by the loss." Grizzard v. United States, 219 U. S., 180.

There are limitations upon the power not only of the rights of the Government where it is a proprietor, but likewise limitations upon its powers as a sovereign. Such limitations as to either the proprietary right or the authority of government as a sovereign operate to prevent the exercise of either right so as to destroy the essential uses of private property. Said the Supreme Court, "To take away the essence and value of property without compensation is practically to take property and this is beyond the power even of sovereignty except by proper proceedings to that end." (Curtin v. Benson, 222 U. S., 78.)

It will be observed that in the present case there was no necessity for the river to be scoured. (That, however, makes no difference even if that necessity existed.)

The Mississippi River Commission made the foothills serve the purpose of a levee line compelling the water to return to the channel in times of high water. They state that in their report. And this statement is accompanied with another having, as I see it, a great bearing in the settlement of the issues. The commission said that the construction of levees was not important for the improvement of the river for navigation. We know that the channel of the river was not improved for purposes of navigation, because vessels of the greatest draft could float upon the bosom of the flood tides. It nowhere appears that the river was not deep enough at any time to be navigated after the subsidence of the flood waters.

It is evident that the levees were raised in excess of 20 feet
54 to protect the lands on the west side of the river from overflow. The consequences of the general confinement of the flood discharged by the levee "as a whole" had the effect of driving plaintiffs away.

Another fact must not be overlooked. Before the crevasse, known as the Bougere Crevasse, occurred, as far back as 1859, the bank did not obstruct the high-water flow. This bank did not extend from 3 to 5 feet above the highest known water as do the levees completed by the United States. Formerly, in times of flood, water went over the bank, and it was the overflow of the river's bank which caused the crevasse. The record discloses that until 1890 there were only two serious overflows, one in 1882 and another in 1884. But even in those years the water went off in time to make a crop.

Many of the cases relating to the rights of riparian owners do not involve the question of obstruction of the natural flow of flood waters. But there are many cases highly persuasive which do deal with the question now before the court. In the early case of Rex v. Trafford, 20 Eng. C. L. R., 498, Lord Chief Justice Tenterden said that, "It has long been established that the ordinary course of water can not be lawfully changed or obstructed for the benefit of one class of persons to the injury of another. Unless, therefore, a sound distinction can be made between the ordinary course of water flowing in a bounded channel at all usual seasons, and the extraordinary course which its superabundant quantity has been accustomed to take at particular seasons, the creation and continuance of these fenders can not be justified. No case has been found that will support such a distinction." Though Trafford v. Rex was reversed because the facts in the case did not warrant a special verdict, the reversing court agreed in the principle laid down by the Court of King's Bench, 21 Eng. C. L. R., 272.

There are very many cases which show the right to have a stream flow as it is wont by nature, which includes the right to have the water flow off from one's premises as it is accustomed to do, and this right "is property."

There are also very many cases which show that where works are constructed below the land of a proprietor, such as a bridge, or culvert, or dam, or alteration of the channel, which cause the water to set back and overflow the land of such proprietor, there is a violation of such right and, if the works are authorized by law, there is a taking for which compensation must be made. The books are full of cases to this effect and may be found summarized in 1 Lewis' Eminent Domain, sec. 80, p. 90, 3d ed. What possible difference can there be between cases like these and cases where works are constructed on one side of a river to the destruction of an owner's land on the other side of the stream?

The doctrine of damnum absque injuria can have no application here, because that principle is only applicable for "those unexpected visitations whose comings are not foreshadowed by the usual course of nature and must be laid to the account of Providence, whose dealings, though they may afflict, wrong no one." Pittsburgh R. R. Co. v. Gilleland, 56 Pa. St., 452; O'Connell v. East Tenn. Ry. Co., 87 Georgia, 261.

Barney, J., concurs in the dissenting opinion.

55 *X. Judgment of the Court.*

No. 18274.

MATTIE W. JACKSON, Widow; WILLIAM GRAHAM JACKSON and GLADYS L. JACKSON, Infants; and ERNEST H. JACKSON

vs.

THE UNITED STATES.

At a Court of Claims held in the City of Washington on the 17th. day of June, 1912, judgment was ordered to be entered as follows:

The Court on due consideration of the premises find for the defendants and do order, adjudge and decree, that the petition of the claimants, Mattie W. Jackson, widow; William Graham Jackson and Gladys L. Jackson, infants; and Ernest H. Jackson, be, and the same is hereby dismissed.

BY THE COURT.

56 *XI. Application for, and Allowance of, Appeal.*

From the judgment rendered in the above-entitled cause on the 17th day of June, 1912, the claimants, by Waitman H. Conaway, their attorney of record, on the 17th day of June, 1912, make application for, and give notice of, an appeal to the Supreme Court of the United States.

WAITMAN H. CONAWAY,
Attorney for Claimants.

Filed June 17, 1912.

Ordered: That the above appeal be allowed as prayed for, June 17, 1912.

BY THE COURT.

57 Court of Claims.

No. 18274.

MATTIE W. JACKSON, Widow; WILLIAM GRAHAM JACKSON and GLADYS L. JACKSON, Infants; and ERNEST H. JACKSON
vs.
THE UNITED STATES.

I, Archibald Hopkins, Chief Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law filed by the Court; of the opinion of the Court; of the dissenting opinions by Howry and Barney, JJ.; of the final judgment of the Court; of the application of the claimants for, and the allowance of, appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 13th day of July, A. D., 1912.

[Seal of Court of Claims.]

ARCHIBALD HOPKINS,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 23,295. Court of Claims. Term No. 720. Mattie W. Jackson, widow; William Graham Jackson and Gladys L. Jackson, infants, by Mattie W. Jackson, their next friend, and Ernest H. Jackson, Appellants, vs. The United States. Filed July 15th, 1912. File No. 23,295.

THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 720.

MATTIE W. JACKSON, WIDOW; WILLIAM GRAHAM JACKSON, AND GLADYS L. JACKSON, INFANTS, BY MATTIE W. JACKSON, THEIR NEXT FRIEND, AND ERNEST H. JACKSON, APPELLANTS,

vs.

THE UNITED STATES.

No. 718.

MARY E. HUGHES, APPELLANT,

vs.

THE UNITED STATES.

No. 719.

THE UNITED STATES, APPELLANT,

vs.

MARY E. HUGHES.

APPEALS FROM THE COURT OF CLAIMS.

MOTION TO ADVANCE.

WAITMAN H. CONAWAY,
Attorney for Appellants in Cases Nos. 718 *and* 720, *and Attorney for Appellee in Case No.* 719.

OCTOBER 21, 1912.